Supreme Court, U.S.
FILED

No. 09-___ 09-709 DEC 15 2009

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IN THE

Supreme Court of the United States

JEFFREY J. REED,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Title VII requires unions to reasonably accommodate employees' religious beliefs. Must an employee suffer discharge or discipline as a prerequisite to challenging the reasonableness of a labor union's religious accommodation?

2. The lower courts have uniformly agreed that employees who have religious objections to supporting labor unions may, as a reasonable accommodation under Title VII, redirect their compulsory union fees to charity. Where a labor union requires that the religious objector must pay more than any other member of the bargaining unit to retain employment, is that a reasonable accommodation?

PARTIES TO THE PROCEEDINGS

The parties before this Court are employee Petitioner Jeffrey J. Reed and Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW").

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Reed respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Sixth Circuit is reported at 569 F.3d 576 (6th Cir. 2009) and is reproduced at Appendix ("App.") 1a. The opinion of the United States District Court for the Eastern District of Michigan is reported at 523 F. Supp. 2d 592 (E.D. Mich. 2007) and is reproduced at App. 55a. The cause determination letter of the Equal Employment Opportunity Commission is reproduced at App. 73a.

JURISDICTION

The Court of Appeals issued its original reported opinion (564 F.3d 781) on May 7, 2009. App. 28a. Petitioner filed a timely petition for rehearing *en banc* on May 15, 2009. The panel withdrew its original opinion and entered an amended opinion on June 23, 2009. Petitioner filed a timely petition for rehearing *en banc* on June 24, 2009, which the Court of Appeals denied on September 21, 2009. App. 75a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the Civil Rights Act of 1964 provides:

> (c) Labor organization practices
> It shall be an unlawful employment practice for a labor organization—
>
> > (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . .

42 U.S.C. § 2000e-2(c)(1).

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

42 U.S.C. § 2000e-2(a)(1).

Section 701(j) of Title VII of the Civil Rights Act of 1964 provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

Jeffery Reed challenges the Sixth Circuit's split decision that he must be fired, or experience some sort of employment discipline, before he is eligible to contest the union's requirement that he pay substantially more in compulsory union fees than any other objecting employee. On this point, the Circuits are in disagreement.

When an employee's religious beliefs conflict with an employment requirement, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) requires that a reasonable accommodation be attempted. Mr. Reed has religious objections to supporting the union. The union's accommodation is to require him to make, as a condition of employment, a charity payment in an amount approximately 22% greater than any other objecting employee must pay.

The dissenting judge on the Sixth Circuit panel found that Mr. Reed need not suffer discharge or discipline as a prerequisite to challenging this scheme, and that the majority opinion was in conflict on this point with decisions of the First, Second, Fourth, Seventh and Ninth Circuits. App. 17a. In

fact, the various Circuits are in turmoil over the necessary elements of a prima facie case of religious accommodation.

This Court granted a writ of certiorari to define the elements of a prima facie case for religious accommodation in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986), but failed to reach that issue. It remains unresolved by the Court to this day.

I. FACTS

Mr. Reed assembles vehicles for AM General. The UAW is Mr. Reed's exclusive bargaining representative. The UAW and AM General entered into a contract requiring Mr. Reed to join the union or pay union fees as a condition of employment.

Mr. Reed sincerely believes that the UAW supports activities that are in conflict with the will of God and the historic teachings of his church. He informed the UAW of the conflict, and then followed the UAW's procedure for applying for a religious accommodation that would allow him to redirect his compulsory union fees to a charity. In accord with the UAW policy, and to show that he did not seek any financial advantage, Mr. Reed offered to make an alternative payment to the Disabled American Veterans.

The UAW constitution grants to voluntary union members the right to object to the political portion of its dues and to receive a rebate of that amount. This allows UAW members to pay less than 100% of full dues and to avoid supporting union politics. Similarly, non-union employees have the right to refrain from paying that portion of dues devoted to politics. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (compulsory union fees can reflect union bargaining costs, but not union political costs). This

allows non-union employees who object to pay less than 100% of full dues and to avoid support for union politics.

As a result, no employee in Mr. Reed's bargaining unit is required to pay full dues to retain employment. They can all, UAW member and non-member alike, choose to pay less than 100% of the full dues amount and still remain employed.

The UAW calculates that approximately 22% of its dues dollar is devoted to politics. Therefore, the UAW claims its *Beck* fee (the amount it does not spend on politics) is about 78 cents of every dues dollar. Mr. Reed does not challenge the UAW's calculation. The result is that every employee in the bargaining unit must pay only $78 of every $100 claimed by the UAW in dues to fulfill all legal obligations and retain employment under the union contract. Paying less than full dues is an option available to both voluntary UAW members and non-UAW employees.

Mr. Reed, who is not a union member, offered to make his charity-substitution payment in the *Beck* amount, so that the amount of his charitable payment would not reflect what the UAW officials spend for politics.

After initial resistance, the UAW agreed to accommodate Mr. Reed's religious beliefs through a charity-substitution payment, but rejected his suggested charity. Instead, it informed him of three other charities to which he could make payment to retain his employment at AM General.

While waiting for the UAW to decide on his religious accommodation request, Mr. Reed had been paying the 78% "*Beck*" fee. When the UAW agreed to

accommodate Mr. Reed, it required him to provide proof of a retroactive payment to the charity in the amount of 100% of union dues, after which it would refund to Reed the *Beck* amount he had paid. That resulted in Mr. Reed having to immediately pay an additional $100, and then continue to pay approximately 22% more than he previously paid. Paying this additional tariff will go on for as long as he remains an AM General employee.

Mr. Reed objected because he was the only employee, union member or non-member, required to pay the full dues amount—including that portion the UAW calculated that it used for politics. Because he is a religious objector, Mr. Reed alone is required to pay an amount equal to 100% of the UAW's dues, and not the 78% of dues that is available to every other employee. App. 4a (Reed is required to make "a monthly charity payment approximately 22% greater than what he would pay the UAW as an objecting member or nonmember.").

II. PROCEEDINGS BELOW

When the UAW refused to grant him an accommodation that limited the amount of the charity payment to that paid by other objecting nonmembers, Mr. Reed filed a charge with the EEOC. Upon investigation, the Commission issued a letter finding cause to believe that the UAW refused to give Mr. Reed a non-discriminatory reasonable accommodation of his sincerely held religious beliefs.

To enforce the EEOC's decision, Mr. Reed sued in federal court. Mr. Reed challenged only the *amount* of his required charity payment. He sought a return of the excessive fees he had paid, and a judgment that he must only pay the *Beck* amount in the future.

On cross-motions for summary judgment, Mr. Reed and the UAW argued only whether a charitable payment fee equal to dues was a reasonable accommodation. The federal district court, *sua sponte*, determined that, before Mr. Reed could challenge the amount of his accommodation payment, he must prove all elements of a religious accommodation case, including proof of "discharge or discipline." App. 63a-64a. Noting that Reed was "still employed," App. 64a, the trial court found that it need not consider the reasonableness of the accommodation offered to him. App. 66a.

Nevertheless, the district court also opined that, because almost all employees *voluntarily* paid the full dues amount, it was not discrimination to force Mr. Reed to pay, over his objection, 100% of dues to a charity. App. 69a.

A three-judge panel of the Sixth Circuit Court of Appeals issued three separate opinions. Judge Batchelder's opinion affirmed on the basis that Mr. Reed failed to establish that he had been discharged or disciplined. She found that in the absence of such harm, the union had no duty to make any sort of accommodation for Mr. Reed. App. 34a. She refused to consider whether discharge or discipline "should be understood to include any adverse employment action," because she did not believe that Mr. Reed had shown any adverse action. App. 36a.

Judge Guy's concurring opinion did not pass on the issue of whether Mr. Reed had shown a prima facie case, but found that requiring Reed to pay more than any other employee was a "reasonable and nondiscriminatory accommodation" because many union members voluntarily paid 100% of dues. App. 39a.

Judge McKeague, dissenting, found that the Sixth Circuit "incorrectly" required a different level of harm in religious accommodation cases than it required in disparate treatment cases. App. 43a. He determined that five other circuits used a different standard. App. 45a.

Even if the Sixth Circuit should continue to require "discharge or discipline" in religious accommodation cases against employers, Judge McKeague concluded that there is no reason to apply that standard to labor unions: "As a union can neither discharge nor discipline an employee," application of that "element in claims against unions would foreclose all such claims." App. 46a.

As to whether Mr. Reed suffered an "adverse action," Judge McKeague thought it was "clear that Reed did suffer an adverse employment action."App. 46a.

He believed the circuit had an obligation to explain what would constitute a prima facie case against a union, because the language of Title VII suggests a different standard applies in cases against employers as opposed to unions. App. 46a-47a.

Because Mr. Reed was required to "make larger payments than secular objectors," Judge McKeague determined that he had suffered a materially adverse action, for it resulted in Mr. Reed "receiving less net income." App. 48a.

Judge McKeague noted that under the opinions of the other two judges, employees of faith "can do nothing but lose." App. 50a. Either the employee accepts the unreasonable accommodation, or the employee "puts his or her employment in jeopardy."App. 50a.

Having concluded that Mr. Reed proved a prima facie case, Judge McKeague addressed the reasonableness of the union's accommodation. He found it unreasonable because a union lacks the authority to charge objecting non-members more than the 78% *Beck* amount. App. 51a-52a. Finally, Judge McKeague determined that the union had a discriminatory motive for imposing higher fees on religious objectors: to deter others from asserting religious objections. App. 53a.

When Mr. Reed petitioned for rehearing *en banc*, the panel withdrew its opinions, and then filed three virtually identical opinions. App. 1a ff. The only substantive difference was that Judge Guy changed a portion of one line of his opinion to agree that Mr. Reed had not made out the elements of a prima facie case. *Compare* App. 12a with App. 39a.

Mr. Reed filed a second petition for rehearing *en banc* that was subsequently denied by the Circuit.

REASONS FOR GRANTING THE WRIT

Nearly twenty-five years ago this Court resolved to settle the question of what an employee must prove to claim a reasonable religious accommodation in the workplace. However, it failed to follow through on the very element at issue here. The result is that the circuits are now evenly divided on the question.

The majority of the split panel below believed that Mr. Reed must be fired or disciplined in order to challenge the reasonableness of the union's requirement that he pay more in compulsory fees than all other employees, non-member and union member alike, are required to pay to retain employment. Requiring discharge or discipline is inconsistent with this Court's recent instructions to the Sixth Circuit in

a parallel case, inconsistent with the decisions of other circuits, inconsistent with the language of Title VII, inconsistent with common sense (unions do not wield the power of the employer), and inconsistent with the common practice of allowing unions an involuntary deduction of their fees from employee paychecks.

Permitting a union to impose a religious accommodation that compels employees of faith to pay more than all other employees is inconsistent with this Court's precedents. This Court requires a non-discriminatory accommodation and places a cap on the amount of union fees that can be charged to objecting employees.

I. THIS COURT PREVIOUSLY GRANTED CERTIORARI TO RESOLVE THE ELEMENTS OF A PRIMA FACIE CASE FOR RELIGIOUS ACCOMMODATION, BUT FAILED TO DO SO.

In the landmark case *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court defined the elements of a prima facie case for disparate treatment claims (including religious discrimination) under Title VII. In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 66-67 (1986), this Court granted a writ of certiorari to define the elements of a prima facie case for religious accommodation, but did not reach that issue. It remains unresolved.

Title VII not only bars religious discrimination, it affirmatively requires reasonable religious accommodation in employment. In modern labor relations, employer targeting of a specific religion for disparate treatment is uncommon. Far more common is the clash between an employee's unique religious beliefs

and a neutral workplace rule. Thus, the elements of the more common of the two classes of Title VII religion claims remain undefined by this Court.

The majority below required "discharge or discipline" as an element of a prima facie case for religious accommodation. Nowhere in the statute does Congress require any sort of "adverse action" as a prerequisite to the right of religious accommodation, much less state that an employee must be fired or disciplined. The clear statutory mandate to attempt an accommodation is antithetical to the idea that an employee must first suffer discharge or discipline before being eligible to obtain an accommodation.

As discussed next, the Sixth Circuit's "discharge or discipline" requirement conflicts with decisions of other circuits—and those circuits are themselves divided over what type of adverse action can be required.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER DISCHARGE OR DISCIPLINE IS A REQUIRED ELEMENT OF A PRIMA FACIE CASE FOR RELIGIOUS ACCOMMODATION.

A. The circuits are equally divided.

In his opinion, Judge McKeague determined that five other circuits use a different standard than what the Sixth Circuit applies. App. 17a. In the Sixth Circuit, an employee must show the following elements for a prima facie case for religious accommodation: 1) a sincere religious belief in conflict with a work requirement; 2) notice to the employer or union about the conflict; and, 3) employee discharge or discipline over the conflict. App. 6a-7a.

The first two elements are consistent with the statute and common sense. They are also consistent with other circuits' decisions. The unsettled point is the third element, often referred to as the "adverse action" element. The validity of this third element was the question upon which this Court granted review in *Ansonia*, but did not resolve. 479 U.S. at 66-67.

The Sixth Circuit's requirement that an employee be discharged or disciplined as a condition of asserting a religious accommodation claim is consistent with language used in religious accommodation opinions of the Third, Fourth, Fifth, Tenth and Eleventh Circuits. Indeed, the Tenth and Eleventh Circuits use only the terms "discharged," "fired," or "not hired," and do not refer to "discipline." The problem with asserting that all of these circuits are in complete accord with the Sixth is that in those cases the employees were, in fact, discharged or disciplined.

However, the First, Second, Seventh, Eighth and Ninth Circuits do allow the "adverse action" element in religious accommodation cases to be satisfied by adverse action that is less than discharge or discipline. What follows is a brief survey of what the circuits require for adverse action in a religious accommodation case.

B. Five circuits use "discharge or discipline" to define adverse action.

The Third Circuit, in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 224 (3d Cir. 2000), uses the term "disciplined" to describe the adverse action element in the context where the employee was terminated.

The Fourth Circuit, in both *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008), and *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996), uses the term "disciplined" to describe the adverse action element. In both cases, the employee was terminated. *Firestone Fibers*, 515 F.3d at 311; *Chalmers*, 101 F.3d at 1017.

The Fifth Circuit uses either "discharged" or "disciplined" to describe the adverse action element. In *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273, 276 (5th Cir. 2000), where the employee was discharged, the court uses "discharged." In *Turpen v. Missouri-Kansas-Texas Railroad*, 736 F.2d 1022, 1024, 1026 (5th Cir. 1984), the employee was discharged and the court uses the term "disciplined."

The Tenth Circuit uses the term "fired" or "not hired" to describe the required "adverse action." In *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir. 2000), where the employee was terminated, the court uses the term "fired" to describe the adverse action element. In *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1484, 1486 (10th Cir. 1989), the employer refused to hire the employee and the court uses the term "not hired" to describe the adverse action element.

The Eleventh Circuit states the adverse action standard as requiring discharge. *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007); *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 592 n.5 (11th Cir. 1994). Although on the face of it the Eleventh Circuit's language is the most extreme, in both cases the employee was discharged and whether something less would suffice was not discussed.

C. Five circuits allow a showing of adverse action by something less than discharge or discipline.

The other circuits satisfy the third element of a prima facie case by something less (sometimes much less) than discharge or discipline.

For example, the Ninth Circuit allows a prima facie religious accommodation claim to be established by showing even a threat of an adverse employment action. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (employee "discharged, threatened, or otherwise subjected . . . to an adverse employment action"). The threat can be implicit. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) ("the employer, at least implicitly, threatened some adverse action"). Far from requiring discharge or discipline, an employee need only face an implicit threat to meet the "adverse action" element in that circuit.

The Seventh Circuit, in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997), states the standard as "discharge or other discriminatory treatment." Later, in *EEOC v. United Parcel Service*, 94 F.3d 314, 318 n.3 (7th Cir. 1996), the Seventh Circuit remarked that religious accommodation claims do not "fit comfortably into the ordinary Title VII dichotomy between 'disparate treatment' and 'disparate impact'" cases. Religious accommodation cases "ordinarily stem, as do 'disparate impact' cases, from the application of some neutral employment policy." *Id.*

Pointing out that this Court in *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977), allows a prima facie case of disparate impact to be

proven through statistical evidence without any individual proof of discrimination, the Seventh Circuit noted in *United Parcel Service* that "the employee, in the prima facie case, must show that the employer *consciously* failed to make an accommodation." 94 F.3d at 318, n.3. There the employee had neither been discharged nor disciplined. The employer refused to allow the employee to take a "public contact" position because (in accord with his religious beliefs) the employee refused to shave his beard. *Id.* at 315.

The First Circuit also broadly states the third element of a prima facie case. In *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002), it refers only to an "adverse employment decision." Although the First Circuit did not discuss its reasoning, a recent lower court decision on religious accommodation in the First Circuit interpreted the "adverse employment decision" requirement as much broader than discharge or discipline. It includes "tak[ing] something of consequence from the employee." *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 13 (D. Mass. 2006).

The Second Circuit has explicitly rejected a "discharge" requirement. In *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *aff'd & remanded on other grounds*, 479 U.S. 60, 67 (1986), the court noted that "[t]he district court placed much reliance on the fact that appellant was not forced into a choice between his job and his religious beliefs . . . ." *Id.* at 482. It also noted that other circuits "have stated that discharge was required to make a prima facie showing of discrimination." *Id.* at 483. However, the court determined that a "choice

here between giving up a portion of [the employee's] salary and his religious beliefs" was sufficient to meet the third element. *Id.* at 482-83.

In a later case, *Knight v. Connecticut Department of Public Health*, 275 F.3d 156, 163 (2d Cir. 2001), one employee seeking a religious accommodation (Quental) had simply been issued a letter of reprimand and told to stop promoting her religious beliefs on company time. The only defect in the employee's prima facie case identified by the court was failure to give notice of her religious beliefs, not a lack of discharge or discipline. *Id.* at 167-68.

In a very recent unpublished religious accommodation case, *Bowles v. New York City Transit Authority*, 285 Fed. Appx. 812, 814 (2d Cir. 2008), the Second Circuit quoted with approval the adverse action standard from its published decision in *Zelnik v. Fashion Institute of Technology*, 464 F.3d 217, 225 (2d Cir. 2006), which included "a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation."[1]

The Eighth Circuit's reading of the third element of a prima facie case requires only any "adverse employment action." *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983 (8th Cir. 2002). This can include "a 'tangible change in duties or working conditions

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[1] *Zelnik*, a First-Amendment case, quotes *Galabya v. New York City Board of Education*, 202 F.3d 636 (2d Cir. 2000), an ADEA case. *Galabya* notes that the Second Circuit analyzes Title VII and ADEA cases under the same legal framework. *Id.* at 640 n.2.

that constitute [sic] a material employment disadvantage.'" *Id.* at 984 (citations omitted).

The district court and the majority of the panel below required discharge or discipline. That requirement conflicts with five circuits, but is consistent with language used by five others.

D. This case squarely presents the conflict among the circuits on adverse action.

Both the district court and Judge Batchelder's opinion highlight the fact that Reed did not bring a disparate treatment claim, thus suggesting a failure to properly raise the discriminatory aspect of the union's excessive fee. App. 71a (trial court); App. 11a (Batchelder). To the contrary, Mr. Reed consistently argued below that a "reasonable" accommodation could not be a "discriminatory" accommodation—which is precisely what this Court ruled in *Ansonia*, 479 U.S. at 71. Indeed, Reed's argument on this point is even quoted in the lower courts. App. 68a (trial court); App. 13a (appeals court).

An employee who objects on religious grounds to paying the union fee is requesting a religious accommodation. Such a request can never be considered a disparate treatment claim. However, having granted Mr. Reed an accommodation, the statute (§ 701(j)) requires that the accommodation be "reasonable," as did this Court in *Ansonia*, 479 U.S. at 71.

That the lower courts should even suggest that Reed might have won if he pled his case differently is remarkable. The Sixth Circuit reads *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as requiring the showing of "adverse action" as an element of a prima facie case for disparate treatment.

Talley v. Bravo Pitino Rest., 61 F.3d 1241, 1246 (6th Cir. 1995). Thus, even if Mr. Reed had pled his case as a disparate treatment claim, the majority of the panel below would have rejected his claim.

Reed has properly argued his case as a "reasonable accommodation" case, and that charging him more than any other employee is not "reasonable." This brings the elements of a reasonable accommodation case unequivocally into focus here.

III. THE SIXTH CIRCUIT'S DECISION TO REQUIRE DISCHARGE OR DISCIPLINE IN A CASE AGAINST A LABOR UNION CONFLICTS WITH THIS COURT'S DIRECTIONS TO THE SIXTH CIRCUIT IN *WHITE V. BURLINGTON NORTHERN & SANTA FE RAILWAY*.

The Sixth Circuit recently found itself corrected by this Court in a parallel matter. In *White v. Burlington Northern & Santa Fe Railway*, 364 F.3d 789, 799 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006), the Sixth Circuit concluded that under Title VII the standard for "adverse action" should be applied uniformly across all Title VII claims, including those raising retaliation issues.

When this Court reviewed *White*, it rejected a "uniform" adverse action standard for all Title VII claims. It determined that in retaliation cases adverse action need not be "limited to discriminatory actions that affect the terms and conditions of employment." *Compare* 364 F.3d at 799 *with* 548 U.S. at 62-64. The result of this Court's correction is that, in a retaliation case, adverse action constitutes anything that "well might have 'dissuaded a reasonable worker from making or supporting a charge of

discrimination.'" *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. at 68 (citations omitted). That standard does not require discharge or discipline.

This Court based that distinction upon the fact that Section 704 of Title VII (42 U.S.C. §2000e-3(a)) (the part dealing with retaliation), merely prohibits an employer to "discriminate against," while Section 703 (42 U.S.C. § 2000e-2(a)(1)) (the part dealing with employer discrimination) prohibits discrimination "with respect to his compensation, terms, conditions, or privileges of employment." *See White*, 548 U.S. at 62, 67.

That same distinction applies to cases against labor unions. The majority on the Sixth Circuit panel below repeated the same error the circuit made in *White*. Like Section 704, Title VII's prohibition applicable to labor unions (Section 703(c)) (42 U.S.C. § 2000e-2(c)(1)) bars discrimination without adding the employment context, *i.e.*, without adding "with respect to . . . compensation, terms, and conditions of employment."

Claims against employers are rooted in the language of 42 U.S.C. § 2000e-2(a)(1) & (2), which includes terms such as "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee." *See TWA v. Hardison*, 432 U.S. 63, 73 (1977). These terms "explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *White*, 548 U.S. at 62.

In contrast, claims against a union are based on statutory language that makes it an unlawful practice for a union to "exclude or to expel from its

membership, or otherwise to discriminate against, any individual because of his . . . religion," 42 U.S.C. § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c)(3).

It is obvious why Congress made such a distinction. As Judge McKeague astutely pointed out below, unions have no power to discharge or discipline an employee. App. 19a. They have no authority to punish an employee with respect to compensation, terms, and conditions of employment.

Using the plain language of the statute as a guide, the "adverse action" standard for religious accommodation cases against a union should be no higher than the standard applied by this Court in retaliation cases: adverse action constitutes anything that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'." *White*, 548 U.S. at 68 (citations omitted). In the religious accommodation context, the standard should be, at least, anything that would likely dissuade a worker from following the dictates of religious conscience.

Even the majority below was uncomfortable with applying the employer standard to a labor union case, for it noted that "prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." App. 8a. The dissent was blunt: "Add th[e] difference in statutory language to the practical reality that a 'discharge or discipline' requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the 'discharge or discipline' requirement in this context." App. 20a.

To require discharge or discipline (matters having to do with compensation, terms and conditions of employment) in a religious accommodation case against a labor union is at odds with this Court's logic in *White*.

IV. THE SIXTH CIRCUIT'S DECISION ON THE FEE AMOUNT CONFLICTS WITH DECISIONS OF THIS COURT.

A. The decision below conflicts with *Ansonia Board of Education v. Philbrook*.

Although *Ansonia* did not resolve the "adverse action" issue, this Court did determine that a reasonable religious accommodation cannot be a discriminatory accommodation. 479 U.S. at 71. The court below found that Mr. Reed was required to pay 22% more in compulsory fees as a religious objector than he would have to pay as an objecting member or non-member. App. 4a. Thus, Mr. Reed was required to pay more than anyone else in the bargaining unit to retain his employment. That higher payment arose for only one reason: Mr. Reed's religious beliefs. The dissent below found that this "accommodation should also be deemed unreasonable under *Ansonia*." App. 25a. Approving a union practice that charges religious objectors more than any other objector conflicts with *Ansonia*.

B. The decision below conflicts with *Communications Workers of America v. Beck*.

This Court has a "black letter" rule that no objecting employee in the United States can ever be compelled to pay for union politics. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (private sector employees); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984) (railroad and airline employees);

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public sector employees).

In *Beck*, this Court construed the "periodic dues and initiation fees" requirement of the National Labor Relations Acts ("NLRA"), 29 U.S.C. § 158, to mean that the *maximum* an objector is required to pay is "financial core" dues—the amount the union spends for bargaining, but not the amount spent on politics. 487 U.S. at 744-45, 751-53, 760-63.

Beck sets the benchmark for the maximum amount of union fees that can be extracted from an unwilling employee. It was not Congress' intent to compel employees to support union politics through their compulsory dues dollars. *Id.* at 755-59. Although Mr. Reed is not paying any money to the union, the statutory cap on the amount that can be compelled under the NLRA from unwilling employees should apply to the charity-substitute payment for religious objectors. The dissent below endorsed this argument: "If a union cannot charge an objecting nonmember more than the *Beck* amount . . . there is no basis for offering an accommodation in excess of that amount." App. 23a.

V. BOTH QUESTIONS PRESENTED ARE OF SIGNIFICANT IMPORTANCE TO THE ADMINISTRATION OF TITLE VII CLAIMS AND CONCERN FUNDAMENTAL RIGHTS.

A. The amount of the charity-substitution payment is an important question of first impression.

The concurring opinion below noted that "no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues." App.

12a. Conditioning a citizen's means of employment on payments to a labor union, or any third party, is a subject that has repeatedly attracted the Court's attention in recent years. In the last thirty years, this Court has reviewed various aspects of compulsory union payments at least eight times.[2] For the state to compel an employee to pay money to a labor union, or even to a charity, raises First-Amendment issues. *Abood*, 431 U.S. at 231 (philosophical and social matters entitled to protection).

The two members of the Sixth Circuit panel who reached that issue split. *Compare* App. 12a *with* App. 24a. Below, the district court and the EEOC were also split, with the trial court disagreeing with the EEOC, which issued a favorable cause determination letter to Mr. Reed. *Compare* App. 69a *with* App. 73a.

In many respects, Title VII imports First-Amendment concepts into the workplace. Were this a First-Amendment claim, there would be little debate that freedom of religion and free speech are seriously compromised by a requirement that employees with certain religious views about supporting labor unions must pay more than any other objecting employee in the bargaining unit.

Compulsory union fees present a special circumstance in which this Court would not find a trivial violation. "The amount at stake for each individual

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[2] *Locke v. Karass*, _ U.S. _ , 129 S. Ct. 798 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

dissenter does not diminish this concern. . . . Thomas Jefferson and James Madison [agreed] about the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986).

Mr. Reed is required, year after year, to pay 22% more than his co-workers must pay to retain their jobs. Because the union gets none of this charitable money, there is no countervailing argument in favor of charging employees of faith more—other than to punish religious objections or deter religious employees from asserting their rights under Title VII. Deterrence is self-evidently not a trivial matter.

No logic supports compelling Mr. Reed to pay 22% more to charity simply because the UAW spends 22% of its dues money to inform its members to vote for politicians favored by union leadership.

B. Requiring discharge or discipline could forever bar religious accommodation claims against unions because of statute of limitations problems.

This Court has long held that, in other Title VII contexts, the statute of limitations begins to run when a violation of Title VII is announced, and not when the effects of the violation are implemented. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). This Court recently reaffirmed the validity of *Ricks*. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 626 (2007).

If the Sixth Circuit is correct that Mr. Reed has no cause of action unless he is actually discharged (or disciplined), and, if the Sixth Circuit is right that threats of discrimination, announcements of the

discrimination or even the actual application of the discriminatory accommodation do not constitute adverse action, then Reed has absolutely no control over a timely filing of an EEOC charge. The statute of limitations would begin running as soon as the union announced that Mr. Reed must pay full dues to charity, but he could not then satisfy the Sixth Circuit's "discharge or discipline" requirement.

Even if Mr. Reed did not acquiesce in the discriminatory accommodation, and refused to make payment and therefore suffered discharge, he would have no control over the timing of the union's request for his discharge or the employer's decision when he should be discharged. A union could thwart all litigation over this issue by simply ensuring that he was discharged at least 300 days after it informed him that he would have to pay to charity more than anyone else was required to pay to remain employed. 42 U.S.C. § 2000e-5(e)(1).

Congress's decision to require a reasonable religious accommodation would be completely frustrated. Employees of faith would not only have to determine that they must suffer discharge to vindicate their statutory rights, they could not be sure that such dire action would assure the timely filing of an EEOC charge. There is absolutely no justification for such a result in either the statute or common sense. As the dissent here complained, if the Sixth Circuit's split opinion is allowed to stand, "The majority opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII." App. 22a.

C. The decision below could forever bar religious accommodation claims against unions because of the way compulsory union payments are extracted from employees.

The Ohio legislature, among legislatures of other populous states, allows the nonconsensual, automatic extraction of union fees from public employees' paychecks. Ohio Rev. Code Ann. § 4117.09(C). Consider the application of the Sixth Circuit standard if Mr. Reed were an Ohio public employee, where his union fees would be involuntarily extracted from his pay. If the union refused to accommodate him in any way, would he be able to show discharge or discipline?

If the Sixth Circuit correctly held that an employee must suffer discharge or discipline, what discharge or discipline has an employee suffered who has no control over the confiscation of union dues? An employee has no ability to satisfy the discharge or discipline element if the employee cannot refuse to pay—yet the violation of the employee's religious beliefs is complete upon the extraction of union fees contrary to the employee's sincere religious beliefs.

As recently as summer 2009, two cases were pending before the U.S. District Court in Columbus, Ohio, in which Ohio public school teachers who had union fees involuntarily taken from their pay claimed the right to a religious accommodation. The union defended that they were not entitled to an accommodation because they had not suffered discharge or discipline. *Bostelman v. Ohio Educ. Ass'n*, No. 2:08 cv930 (S.D. Ohio dismissed Sept. 29, 2009); *Hart v. Ohio Educ. Ass'n*, No. 2:08cv1141 (S.D. Ohio dismissed Sept. 29, 2009).

Ms. Bostelman is a public school teacher who is close to retirement. Should she have had to quit her teaching job to keep her conscience clear? And, if the Sixth Circuit majority is correct about what constitutes adverse action, would even quitting be sufficient to establish a prima facie case for religious accommodation?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to eliminate the conflict among the Circuits over what an employee of faith must prove to claim a religious accommodation, to bring the turmoil in the lower courts in line with the will of Congress, and to protect employees from having to choose between their God and their job. At the same time, the Court should settle the amount of the charity-substitution payment.

Respectfully submitted,

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APPENDIX

APPENDIX A

[569 F.3d 576]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

No. 07-2505

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-14233—SEAN F. COX, District Judge.

Argued: September 17, 2008
Decided and Filed: June 23, 2009

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

BATCHELDER, J., delivered the opinion of the court. GUY, J. (pp. 10-11), delivered a separate concurring opinion. McKEAGUE, J. (pp. 12-21), delivered a separate dissenting opinion.

AMENDED OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Jeffrey Reed appeals the district court's order granting summary judgment in favor of Defendant-Appellee International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). Reed claims that UAW, in violation of Title VII of the Civil Rights Act of 1964, failed to provide a reasonable accommodation for his religious objection to financially supporting the union. Because Reed has failed to make out a prima facie religious accommodation case, we **AFFIRM**.

I. BACKGROUND

UAW represents the employees of automobile manufacturer AM General in Mishawaka, Indiana. The collective bargaining agreement between UAW and AM General includes a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues. The UAW Constitution grants both members and non-member agency fee payers "the right to object to the expenditure of a portion of his/her dues money for activities or causes primarily political in nature" and to receive a rebate for that portion. UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three charities mutually designated by UAW and AM General.

On May 20, 2002, AM General hired Reed to work at its Mishawaka facility, and Reed immediately became a UAW member. After reading UAW publications, Reed concluded that he could not financially support the union without violating his personal religious convictions. Reed terminated his UAW membership on October 18, 2004. UAW notified Reed that it would treat him as an objecting non-member and directed AM General to deduct from Reed's pay an agency fee consisting only of that portion of the union dues not used for political expenditures.

On February 10, 2005, Reed informed UAW that he had religious objections to supporting the union in any amount and asked to donate to Disabled American Veterans the reduced agency fee he had been paying UAW as an objecting non-member. On November 10, 2005, after receiving confirmation from Reed's pastor that Reed held *bona fide*, personal convictions against supporting the union, UAW granted Reed's request to be treated as a religious objector. UAW instructed Reed to pay $439.44, the amount of full union dues that had accrued since February 1, 2005,[1] to one of the three charities selected by UAW and AM General. UAW further explained that upon Reed's delivering to UAW a receipt showing full payment to an approved charity, the union would refund him $339.62, the amount he had paid in agency fees from February 2005 through November 2005. Reed paid $439.44 to Riley's Children Foundation, one of the designated charities, and UAW refunded him $339.62. This arrangement caused Reed to pay approximately $100 more to charity as a religious objector than he

[1] Although Reed's notice of his religious objection was dated February 10, 2005, UAW announced that it would consider his religious-objector status as beginning on February 1, 2005.

had paid to UAW in agency fees as an objecting non-member. Reed's ongoing union security obligation requires him to make a monthly charity payment approximately 22% greater than what he would pay UAW as an objecting member or non-member.

Reed filed this action on September 26, 2006, alleging that UAW failed reasonably to accommodate his religious objections to supporting the union. On October 19, 2007, the district court ruled on the parties' cross-motions for summary judgment and held that: (1) Reed had failed to establish his prima facie case because he had not shown that he had been discharged or disciplined; and (2) even if Reed had established a prima facie case, UAW's accommodation of Reed's religious objections was reasonable. Reed timely appealed that decision to this court.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In order to defeat a summary judgment motion, the nonmoving party "must show sufficient evidence to create a genuine issue of material fact." *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002) (citing *Klepper v. First Am. Bank*,

916 F.2d 337, 342 (6th Cir. 1990)). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). That is, the nonmoving party must present evidence sufficient to permit a reasonable jury to find in its favor. *Id.* Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996).

III. ANALYSIS

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for a labor organization . . . to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ." 42 U.S.C. § 2000e-2(c). There are two basic types of religious discrimination claims that an individual may bring against a labor union under Title VII: disparate treatment claims and religious accommodation claims. In raising a disparate treatment claim, a plaintiff alleges that the union has treated him less favorably than similarly-situated applicants or members because of his religion. Here, Reed has not brought a disparate treatment claim. In fact, he has in his briefs before this court taken pains to emphasize that he has taken only the "accommodation path," a theory of recovery under which Reed asserts that the union has failed reasonably to accommodate a conflict between an employment requirement and his religious beliefs.

Title VII provides for religious accommodation claims in its definition of religion, which includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This definition imposes upon employers a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship[.]" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). Although the definition mentions only employers, "courts have held that the duty to accommodate an employee's religious beliefs extends to unions as well as employers." *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990); *see also EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 n.7 (1st Cir. 2002) ("[C]ourts have uniformly imposed upon labor organizations the same duty to provide reasonable accommodations.").

In this circuit, it is settled that "[t]he analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (quoting *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987)). "To establish a prima facie case, [a plaintiff] must show that '(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflict; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement.'" *Id.* "Once an employee has established a prima facie case, [the defendant] has the burden 'to show that it

could not reasonably accommodate the employee without undue hardship.'" *Id.* (quoting *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002)).

Reed's prima facie case failed, the district court held, because he had not presented sufficient evidence from which a jury could find that he had been discharged or disciplined. Reed contends that the district court was "confused about the elements of proof" The only disputed issue in the case, Reed argues, is whether he has been reasonably accommodated—not whether he should have been accommodated. Reed thus insists that he is not required to prove the elements of a prima facie religious discrimination case.

We have declined to relieve a religious accommodation plaintiff of his burden to establish a prima facie case, including the requirement that he demonstrate that he has been discharged or disciplined. *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 637 (6th Cir. 2003). Reed cannot avoid this requirement by insisting that the only controversy here concerns the reasonableness—not the necessity—of his accommodation. Unless a plaintiff has suffered some independent harm caused by a conflict between his employment obligation and his religion, a defendant has no duty to make any kind of accommodation. *See id.* Even Reed admits that "absent an accommodation requirement, he could not claim that he had a right to pay his union fees to charity." And although an employer or union may not dole out accommodations in a discriminatory fashion, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986), Reed explicitly has disavowed any disparate treatment claim.

Reed alternatively argues that he may satisfy the "discharge or discipline" element of the prima facie case by showing any adverse employment action.

Otherwise, Reed contends, a religious accommodation plaintiff could never establish a prima facie case against a labor union defendant, because a labor union cannot by itself discharge or discipline an employee. Reed contends that the amount he must pay to charity in excess of the amount other objectors pay to UAW "is effectively a reduction in his pay" and constitutes an adverse action.

True, the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union. Just as a union cannot unilaterally discharge or discipline an employee, it cannot by itself impose an employment obligation.[2] We need not attempt here to specify the precise contours of a prima facie case against a labor union, however. Nor do we have to determine the broader question of whether "discharge or discipline" should be understood to include any adverse employment action. The dissent contends that "[t]his case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline." Dissenting Op. at 15. But because we hold that the specific accommodation Reed challenges here does not rise to the level of an adverse employment action, we are not presented with the issue of whether a plaintiff can proceed on a showing of an employment action that is "adverse" but is not a form of "discharge or discipline." Other than the accommodation itself, the reasonableness of which he

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[2] Reed's lawsuit is against UAW only, although the charity payment requirement to which Reed objects is imposed under the terms of a letter agreement signed by both UAW and AM General.

challenges, Reed cannot point to any action by UAW that has adversely affected his employment. And whatever "discharge or discipline" or "adverse employment action" may mean in other contexts, a plaintiff does not carry his burden merely by showing that he has lost some amount of pay as a result of a proffered accommodation. *Tepper*, 505 F.3d at 514. Even under the standard the dissent proposes, the incremental adjustment to Reed's pay as a result of his charity-substitution payment is not actionable: It is not a *materially* adverse change in the terms or conditions of his employment. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996).

In *Tepper*, we rejected a similar attempt to establish an identity between the challenged accommodation and the alleged injury. There, the plaintiff was a Messianic Jew who observed each Saturday as his Sabbath. *Id.* at 511. Although the post office for which Tepper worked followed a rotating schedule that allowed employees to take turns having Saturdays off, initially the staffing levels were sufficiently high for management to accommodate Tepper by giving him every Saturday off. *Id.* at 511-12. After staffing levels were reduced, this arrangement became difficult to sustain, and Tepper's supervisor informed him that his accommodation was being withdrawn. *Id.* at 512. The supervisor advised Tepper to reserve vacation time for Saturday absences, to use annual leave and unpaid leave, and to exchange days off with other employees. *Id.* at 512-13. Tepper argued that this alternative arrangement constituted a form of discipline because it forced him to take unpaid leave, reducing his annual pay and his pension. *Id.* at 513. We held, however, that "more than loss of pay is required to demonstrate discipline or discharge." *Id.* at 514.

Just as the plaintiff in *Tepper* could not point to any "discipline" other than the accommodation he claimed was unreasonable, Reed has suffered no discipline or adverse employment action other than the accommodation he claims is unreasonable—his required charity-substitution payment. The dissent contends that our reliance on *Tepper* is misplaced because in that case the employee was offered the option of taking unpaid leave so he could observe his Sabbath. Tepper's loss was different from Reed's, the dissent insists, because Tepper simply was not being paid for days he did not work. Dissenting Op. at 17. Even so, Tepper's accommodation required him to choose between violating his Sabbath by working his scheduled Saturdays, and observing his Sabbath but having limited opportunities to make up the lost hours and pay. Here, Reed's accommodation required him to choose between violating his religious beliefs by paying the agency fee—albeit the reduced agency fee —to the union, and honoring his religious beliefs by paying nothing to the union, but paying more out of pocket in order to satisfy his union security obligation. So in both *Tepper* and this case, the employee faced a choice of suffering either a monetary loss or a religious loss. Also of note, each plaintiff received a corresponding benefit unavailable to other employees: Tepper got every Saturday off, and Reed pays the union nothing while enjoying the benefits negotiated through collective bargaining.

The dissent contends that unless we are willing to treat a challenged accommodation as an adverse action, an employee can never prevail on a religious accommodation claim unless he is first discharged or disciplined: "If the employee accepts the accommodation, then, under the lead opinion's view, the employee has acquiesced in the discrimination and abandoned

any hope of a remedy." Dissenting Op. at 18. But an employee who believes that he is being treated less favorably because of his religion or some other protected ground has the right to bring a disparate treatment claim—a claim that Reed explicitly has disavowed.

IV. CONCLUSION

Because Reed has not shown any material adverse employment action, much less discharge or discipline, his religious accommodation claim fails. We therefore **AFFIRM** the district court's granting summary judgment in favor of UAW.

CONCURRENCE

RALPH B. GUY, JR., Circuit Judge, concurring. I write separately to clarify my reasons for affirming the decision granting summary judgment to the UAW with respect to Reed's Title VII religious accommodation claim. Although Reed has not made out a *prima facie* case, I agree with the district court that, even if he had, the UAW's accommodation requiring substitute payment of the full amount of dues to a charity constituted a reasonable and nondiscriminatory accommodation of Reed's religious beliefs.

Title VII's definition of "religion" makes it an unlawful employment practice not to make reasonable accommodation for the religious practices of employees unless it would cause undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). An employee is entitled only to a reasonable accommodation, and, if reasonable, the defendant need not show that the employee's preferred accommodation would result in undue hardship. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986). The duty to accommodate an employee's religious beliefs extends to unions as well as employers. *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990). Although several circuits have held that a union reasonably accommodates religious objectors by permitting the substitution of charitable contributions for union dues, no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues. *See Wilson*, 920 F.2d at 1286; *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 451 (7th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981).

In addressing the question of reasonableness, the Court in *Ansonia* focused on whether the accommodation eliminated the conflict between the employment requirement and the employee's religious beliefs. 479 U.S. at 70. There, the specific accommodation—allowing the plaintiff to take unpaid leave to avoid working on Saturdays—eliminated the conflict between the employment requirement and religious practices and required him only to give up compensation for a day that he did not in fact work. *Id.* at 70-71. In this case, Reed concedes that allowing him to make substituted charitable contributions, even in the full amount of the dues, eliminated the conflict between the union security clause and his religious beliefs. Reed actually argues that the accommodation was not reasonable because it was discriminatory, relying on the caveat in *Ansonia* that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones." *Id.* at 71.

Reed insists that the relevant comparison is not with nonobjectors who pay the full amount of the dues, but with nonmember objectors (*Beck* objectors) who pay only that portion of dues expended on "core" representational activities (*i.e.*, 78.29% of the full dues). *See Communications Workers v. Beck*, 487 U.S. 735 (1988). In arguing that the difference is religious discrimination, Reed characterizes the comparison as being between "secular" and "religious" objectors. This is both misleading and inaccurate—as plaintiff's own situation demonstrates—since an employee may elect nonmember *Beck* status because the union's political activities conflict with his religious beliefs. The difference is based not on the employee's reasons for objecting, but rather on the nature of the respective objection, and different objections call for different accommodations. *See, e.g., EEOC v. Univ. of Detroit*,

904 F.2d 331, 335 (6th Cir. 1990). Nor is Reed persuasive in arguing that only religious objectors are *compelled* to pay an amount equal to the full dues because any nonobjecting member can choose to leave the union and assert *Beck* objector status. That is to say nothing more than that an employee cannot be compelled *if* he is a *Beck* objector. Since the accommodation provided plaintiff in this case was reasonable, the district court did not err in granting summary judgment to the UAW with respect to Reed's religious accommodation claim.

DISSENT

McKEAGUE, Circuit Judge, dissenting. The majority opinion affirms based on Reed's failure to demonstrate either discharge or discipline as part of his prima facie case against his union—a union, it is worth noting, that does not have the power to discharge or to discipline. I do not think either Title VII or our past holdings requires such a showing. An adverse employment action should be all that is required to establish a prima facie case for a religious accommodation claim, and certainly no more than that should be required in a claim against a union. The UAW required Reed to pay more dues because of the religious nature of his objection to the union, and this increased payment was an adverse employment action. I would therefore hold that the increased payment was sufficient to establish the final element of Reed's prima facie case.

I also disagree with the concurring opinion's analysis of the reasonableness of the accommodation. Because I do not agree with either ground offered for affirming the district court's judgment, I respectfully dissent.

I.

Religious accommodation claims against employers arise under the same statutory provisions as other Title VII religions discrimination claims. Title VII makes it an unlawful employment practice to "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *TWA v. Hardison*, 432 U.S. 63, 74 (1977). Section 2000e-2(a)(1) also provides the basis for religious disparate treatment claims. *See Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir. 2007).

Despite the single statutory source for Title VII religious discrimination claims, our past decisions have incorrectly suggested a different level of harm is required to establish a prima facie disparate treatment claim based on religion than is required to establish a prima facie religious accommodation claim. A disparate treatment claim requires the employee show, among other things, "that he experienced an adverse employment action." *Tepper*, 505 F.3d at 515. An adverse

employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). A religious accommodation claim, meanwhile, appears to require a plaintiff to make a higher showing that "he was discharged or disciplined for failing to comply with the conflicting employment requirement." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

This distinction between the amount of harm required under a disparate treatment theory and under a religious accommodation theory is not required by the statute. *See* 42 U.S.C. § 2000e-2(a)(1). It is also not required by our past holdings, though it is true that our religious accommodation precedents do use the "discharge or discipline" language. That is not surprising, because those decisions invoking the third element of the religious accommodation prima facie case almost invariably involve discharged employees. *See Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508, 515 (6th Cir. 2002) (discharged employee); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (discharged employee); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) (discharged employee); *McGuire v. Gen. Motors Corp.*, 956 F.2d 607, 609 (6th Cir. 1992); *Smith*, 827 F.2d at 1084 (discharged employee). These cases therefore did not need to address whether a claim could survive without showing that the plaintiff had been discharged.

Our two most recent religious accommodation cases illustrate only that the prima facie case cannot be satisfied without showing some adverse employment

action. In *Tepper*, we found that the plaintiff had failed to establish the prima facie case because the only action taken against him was that his employer required Tepper to use unpaid leave for his observance of the Sabbath. 505 F.3d at 514. We noted that this not only failed to establish the prima facie case for religious accommodation, it failed to establish any adverse action at all. *See id.* at 516. Similarly, in *Goldmeier v. Allstate Ins. Co.*, the plaintiffs quit their jobs before experiencing any adverse effect from their employer's failure to accommodate their religious beliefs. 337 F.3d 629, 633 (6th Cir. 2003). *Tepper* and *Goldmeier* therefore both involve plaintiffs that have not shown any adverse action, much less either discharge or discipline. They do not address whether a claim could succeed upon a showing of an adverse employment action other than discharge or discipline.

Other circuits have stated that an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *see also Bowles v. New York City Transit Auth.*, 285 F. App'x 812, 813 (2d Cir. 2008); *Ali v. Alamo Rent-A-Car, Inc.*, 8 F. App'x 156, 158-59 (4th Cir. 2001). Indeed, I can find no decision in any circuit in which an appellate court found a plaintiff failed to establish a prima facie case where the plaintiff had demonstrated a materially adverse employment action.

Moreover, our precedents allude to the sufficiency of an adverse employment action in religious accom-

modation claims. In *Goldmeier*, we rejected the appellants' argument that they need not show any harm in order to satisfy the prima facie case: "neither this court, nor any of its sister circuits with substantively parallel religious discrimination jurisprudence, has ever endorsed the Goldmeiers' conclusion that no adverse employment action need be shown to sustain a prima facie case." 337 F.3d at 637. In *Tepper*, this court equated the "discharge or discipline" element of the religious accommodation prima facie case with the "materially adverse employment action" requirement of a disparate treatment claim. 505 F.3d at 516.

This case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline. I would hold that a plaintiff should be able to succeed on such a showing. While discharge or discipline (assuming it is sufficiently severe) will always constitute a materially adverse employment action, there is no legal or logical reason why a plaintiff who suffers a materially adverse employment action must also show discharge or discipline.

II.

Further, even assuming that our precedents compel this court to require a showing of discharge or discipline in a religious accommodation suit against an employer, there is no reason to extend that requirement to claims brought against unions. As the majority opinion acknowledges, "the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." There is a reason they do not fit nicely: the artificially high standard that we have previously suggested for

a prima facie case against an employer simply can never be met in a claim against a union. As a union can neither discharge nor discipline an employee, applying the "discharge or discipline" element in claims against unions would foreclose all such claims. The majority opinion attempts to avoid this result by simply noting that there is no adverse employment action in this case. As I discuss below, I think it is clear that Reed did suffer an adverse employment action. Even putting that to the side, however, I cannot see how we can avoid entirely the question of what level of harm a plaintiff must show in a claim against a union. We cannot hold that Reed failed to meet the prima facie case without any indication of what that prima facie case is.

Indeed, Title VII itself suggests there may be a difference between claims against employers and claims against unions. A religious accommodation claim against employers is rooted in 42 U.S.C. § 2000e-2(a)(1). *See Hardison*, 432 U.S. at 73. The Supreme Court has held that the language of that section—"'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Burlington N and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). The same language does not exist in Title VII's union provision. Instead, it is an unlawful practice for a union to "exclude or . . . expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion," *id.* § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." *Id.* § 2000e-2(c)(3). Notably, the phrase "otherwise discriminate against" is similar

to that in Title VII's retaliation provision, which the Supreme Court has held is more expansive than the language in the provision giving rise to disparate treatment claims. *See Burlington*, 548 U.S. at 63-64.

Thus, even if this case does not provide an opportunity to clarify exactly what standard should apply in religious accommodation claims against unions (which I submit it does), the difference in statutory language should at least give us pause before we extend the "discharge or discipline" requirement to claims against unions. Add this difference in statutory language to the practical reality that a "discharge or discipline" requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the "discharge or discipline" requirement in this context.

III.

As discussed above, I believe that a materially adverse employment action is the appropriate standard for all religious accommodation claims. Reed satisfied that standard. The UAW required Reed to make larger payments than secular objectors. This disparity constitutes an adverse employment action. Under Title VII, an employment action must amount to "a materially adverse change" in the terms or conditions of employment to be actionable. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *see also Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004). Notably, the Supreme Court stated that such an action will "in most cases inflict[] direct economic harm." *Ellerth*, 524 U.S. at 762. The economic effect does not have to be large in order to be an adverse employment action. *See White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789,

794, 802 (6th Cir. 2004) (en banc). A differential in pay establishes an adverse employment action. *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 758 (6th Cir. 2004).

The UAW required that Reed donate the full amount of union dues to charity rather than the lower amount political objectors must pay the union. If Reed had a secular objection to the union, the amount Reed would have to pay would decrease. This is a direct economic effect that resulted in Reed receiving less net income. As such, the ongoing higher payment the union requires of religious objectors constitutes an adverse employment action.

IV.

The majority opinion seeks to minimize the significance of this economic burden by relying on *Tepper*. Yet *Tepper* presented a significantly different set of facts. In *Tepper*, the plaintiff sought days off to observe religious holidays. 505 F.3d at 512. His employer originally accommodated him, but later rescinded the accommodation. *Id.* His employer continued to permit the plaintiff to use unpaid leave for all of his holidays. *Id.* The plaintiff alleged that using unpaid leave decreased his pay. *Id.* We dismissed this argument, noting that "[t]he Supreme Court has stated that 'the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.'" *Id.* at 514. We then concluded that "Tepper is simply not being paid for the time he does not work." *Id.* The same cannot be said for Reed.

Nor am I persuaded that the fact the adverse employment action in this case occurs as part of an

accommodation should alter the analysis of the prima facie case. There is no indication in our case law that the prima facie case is limited in this way. In *Tepper*, for example, we found that the prima facie case was not satisfied because the accommodation did not harm the plaintiff—not because the harm to the plaintiff was part of an accommodation. *See* 505 F.3d at 514.

Moreover, the majority opinion's arbitrary distinction between employer/union practices that "count" for the prima facie religious accommodation case and those that do not places religious employees in an unavoidable bind. If an employer or union offers the employee an accommodation that adversely affects the terms and conditions of his or her employment, the employee can do nothing but lose. If the employee accepts the accommodation, then, under the majority opinion's view, the employee has acquiesced in the discrimination and abandoned any hope of a remedy. Meanwhile, if an employee rejects the accommodation, the employee not only puts his or her employment in jeopardy, the employee also runs afoul of the Supreme Court's instruction that the employer, not the employee, chooses the accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-69 (1986). The majority opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII.

V.

I also find the concurring opinion unpersuasive in its analysis of the reasonableness of the accommodation at issue here. Unlike the concurring opinion, I do not think it is enough to say that Reed's objection is different from other accommodated objectors. Though

this is undoubtedly true, it does not explain why the accommodation is reasonable.

While the union does not have to use the accommodation proffered by the employee, the union must offer a *reasonable* accommodation. *See E.E.O.C. v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). I would find the accommodation here unreasonable for two reasons: the union cannot require a payment of this size from a nonmember, and the accommodation is discriminatory.

The Supreme Court has held that unions may exact from objecting nonmembers "only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988) (internal quotation marks and citation omitted). Based on this, the Sixth Circuit has observed that *Beck* "limit[ed] the amount of dues a union can charge a non-union member." *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367 (6th Cir. 1994). If a union cannot charge an objecting nonmember more than the *Beck* amount, it seems to me that there is no basis for offering an accommodation in excess of that amount. As Reed is an objecting nonmember, it seems to me that a reasonable accommodation should be based on the amount that the union can require from objecting nonmembers under *Beck*.[1]

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[1] Although Reed did not articulate the argument in quite this fashion, he did raise a functionally identical argument in his briefs. Rather than phrasing the argument in terms of the amount the union can require him to pay, he argued that *Beck* gave objectors the right to choose not to pay the portion of union dues used for political purposes.

In this regard, I find persuasive the district court opinion in *O'Brien v. City of Springfield*. Relying on a state statute and a state regulation that provided a rule similar to the rule established in *Beck*,[2] a Massachusetts district court held that requiring a donation equal to full union dues was "*a per se* unreasonable accommodation." 319 F. Supp. 2d 90, 107 (D. Mass. 2003). It further explained that a union "is not entitled to charge whatever amount it wishes to someone making a charitable substitution." *Id.* at 106. The same reasoning should apply under *Beck*. The union should not be able to require objecting nonmembers to pay any more than *Beck* permits.[3] As

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[2] The union notes that, unlike under *Beck*, the Massachusetts law does not permit unions to charge any nonmembers more than the agency service fee. *See* Mass. Gen. Laws ch. 150E, § 12; Mass. Regs. Code tit. 456, § 17.04. For the reasons given below in footnote 3, I do not think this distinction alters the analysis of the reasonableness of the accommodation in this case.

[3] The union argues that, because nonmembers who do not object can be required to pay the full amount, the relevant benchmark should be the full dues amount. However, there is absolutely no dispute here that Reed has made his objections known to the union. Therefore, the relevant amount should be the *Beck* amount, not the full dues amount. So long as an objector makes his or her objection known, the union *cannot* charge the full dues amount under *Beck*. *See Beck*, 487 U.S. at 762-63; *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740, 774 (1961). What the union can charge other employees should therefore be irrelevant in determining the accommodation for Reed. Rather, the relevant standard should be based on the status of the employee in question. It would likewise be fruitless for an employer to argue that, when reviewing the termination of a for-cause employee, the court should consider that an employer can fire an at-will employee for any reason. Instead, what matters is the for-cause status of the employee in question. Similarly, the union should not point to the dues it can require other

Reed is an objecting nonmember, I would find that the union's attempt to force Reed to donate the full union dues amount rather than the amount paid by *Beck* objectors is unreasonable.

Further, the accommodation is discriminatory. The union admits that it prefers the elevated amount because "this arrangement does not create any financial incentive for employees to claim religious objection in order to reduce their financial obligations." Response Br. at 32. The value of the higher amount is precisely its deterrence of other members and nonmembers from asserting their religious objections. The union offers no other reason for requiring the elevated payments, and I cannot think of a non-discriminatory reason for requiring religious objectors such as Reed to pay more in order to accommodate their objections. I would therefore find the amount the union requires Reed to pay is discriminatory. As such, the accommodation should also be deemed unreasonable under *Ansonia Board of Education v. Philbrook*. See 479 U.S. 60, 71 (1986) ("Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.").

VI.

There is no question that the only way Reed could avoid the conflict between his religious beliefs and the UAW's requirements was through a payment greater than that required of other objectors. I would find this sufficient to establish the third prong of the prima facie case for religious accommodation. I also would find the accommodation offered by the union

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employees to pay; what matters is the amount it could otherwise require Reed to pay.

unreasonable because the union lacks the authority to require such a large payment and the accommodation discriminates against religious objectors. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed June 23, 2009]

No. 07-2505

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

AMENDED JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment in favor of defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX C

[564 F.3d 781]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

No. 07-2505

Appeal from the United States District Court for the Eastern District of Michigan at Detroit
No. 06-14233—Sean F. Cox, District Judge

Argued: September 17, 2008
Decided and Filed: May 7, 2009

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

BATCHELDER, J., delivered the opinion of the court. GUY, J. (pp. 10-11), delivered a separate opinion concurring in the result. McKEAGUE, J. (pp. 12-20), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Jeffrey Reed appeals the district court's order granting summary judgment in favor of Defendant-Appellee International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). Reed claims that UAW, in violation of Title VII of the Civil Rights Act of 1964, failed to provide a reasonable accommodation for his religious objection to financially supporting the union. Because Reed has failed to make out a prima facie case of religious discrimination, we **AFFIRM**.

I. BACKGROUND

UAW represents the employees of automobile manufacturer AM General in Mishawaka, Indiana. The collective bargaining agreement between UAW and AM General includes a union security provision under which all AM General employees must either become UAW members or pay the union an agency fee equal to the amount of membership dues. The UAW Constitution grants both members and non-member agency fee payers "the right to object to the expenditure of a portion of his/her dues money for activities or causes primarily political in nature" and to receive a rebate for that portion. UAW and AM General also are parties to a letter agreement that allows any employee with a *bona fide* religious objection to joining or supporting a labor union to satisfy his union security obligation by making a payment equal to full membership dues to one of three charities mutually designated by UAW and AM General.

On May 20, 2002, AM General hired Reed to work at its Mishawaka facility, and Reed immediately became a UAW member. After reading UAW publications, Reed concluded that he could not financially support the union without violating his personal religious convictions. Reed terminated his UAW membership on October 18, 2004. UAW notified Reed that it would treat him as an objecting non-member and directed AM General to deduct from Reed's pay an agency fee consisting only of that portion of the union dues not used for political expenditures.

On February 10, 2005, Reed informed UAW that he had religious objections to supporting the union in any amount and asked to donate to Disabled American Veterans the reduced agency fee he had been paying UAW as an objecting non-member. On November 10, 2005, after receiving confirmation from Reed's pastor that Reed held *bona fide*, personal convictions against supporting the union, UAW granted Reed's request to be treated as a religious objector. UAW instructed Reed to pay $439.44, the amount of full union dues that had accrued since February 1, 2005,[1] to one of the three charities selected by UAW and AM General. UAW further explained that upon Reed's delivering to UAW a receipt showing full payment to an approved charity, the union would refund him $339.62, the amount he had paid in agency fees from February 2005 through November 2005. Reed paid $439.44 to Riley's Children Foundation, one of the designated charities, and UAW refunded him $339.62. This arrangement caused Reed to pay approximately $100 more to charity as a religious

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[1] Although Reed's notice of his religious objection was dated February 10, 2005, UAW announced that it would consider his religious-objector status as beginning on February 1, 2005.

objector than he had paid to UAW in agency fees as an objecting non-member. Reed's ongoing union security obligation requires him to make a monthly charity payment approximately 22% greater than what he would pay UAW as an objecting member or non-member.

Reed filed this action on September 26, 2006, alleging that UAW failed reasonably to accommodate his religious objections to supporting the union. On October 19, 2007, the district court ruled on the parties' cross-motions for summary judgment and held that: (1) Reed had failed to establish his prima facie case because he had not shown that he had been discharged or disciplined; and (2) even if Reed had established a prima facie case, UAW's accommodation of Reed's religious objections was reasonable. Reed timely appealed that decision to this court.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In order to defeat a summary judgment motion, the nonmoving party "must show sufficient evidence to create a genuine issue of material fact." *Prebilich-*

Holland v. Gaylord Entm't Co., 297 F.3d 438, 442 (6th Cir. 2002) (citing *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990)). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). That is, the nonmoving party must present evidence sufficient to permit a reasonable jury to find in its favor. *Id.* Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996).

III. ANALYSIS

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for a labor organization . . . to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . 42 U.S.C. § 2000e-2(c). There are two basic types of religious discrimination claims that an individual may bring against a labor union under Title VII: disparate treatment claims and religious accommodation claims. In raising a disparate treatment claim, a plaintiff alleges that the union has treated him less favorably than similarly-situated applicants or members because of his religion. Here, Reed has not brought a disparate treatment claim. In fact, he has in his briefs before this court taken pains to emphasize that he has taken only the "accommodation path," a theory of recovery under which Reed asserts that the union has failed reasonably to accommodate a conflict between an employment requirement and his religious beliefs.

Title VII provides for religious accommodation claims in its definition of religion, which includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This definition imposes upon employers a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship[.]" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). Although the definition mentions only employers, "courts have held that the duty to accommodate an employee's religious beliefs extends to unions as well as employers." *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990); *see also EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 n.7 (1st Cir. 2002) ("[C]ourts have uniformly imposed upon labor organizations the same duty to provide reasonable accommodations.").

In this circuit, it is settled that "[t]he analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007) (quoting *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987)). "To establish a prima facie case, [a plaintiff] must show that '(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflict; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement.'" *Id.* "Once an employee has established a prima facie case, [the defendant] has the burden 'to

show that it could not reasonably accommodate the employee without undue hardship.'" *Id.* (quoting *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002)).

Reed's prima facie case failed, the district court held, because he had not presented sufficient evidence from which a jury could find that he had been discharged or disciplined. Reed contends that the district court was "confused about the elements of proof." The only disputed issue in the case, Reed argues, is whether he has been reasonably accommodated—not whether he should have been accommodated. Reed thus insists that he is not required to prove the elements of a prima facie religious discrimination case.

We have declined to relieve a religious accommodation plaintiff of his burden to establish a prima facie case, including the requirement that he demonstrate that he has been discharged or disciplined. *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 637 (6th Cir. 2003). Reed cannot avoid this requirement by insisting that the only controversy here concerns the reasonableness—not the necessity—of his accommodation. Unless a plaintiff has suffered some independent harm caused by a conflict between his employment obligation and his religion, a defendant has no duty to make any kind of accommodation. *See id.* Even Reed admits that "absent an accommodation requirement, he could not claim that he had a right to pay his union fees to charity." And although an employer or union may not dole out accommodations in a discriminatory fashion, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986), Reed explicitly has disavowed any disparate treatment claim.

Reed alternatively argues that he may satisfy the "discharge or discipline" element of the prima facie case by showing any adverse employment action. Otherwise, Reed contends, a religious accommodation plaintiff could never establish a prima facie case against a labor union defendant, because a labor union cannot by itself discharge or discipline an employee. Reed contends that the amount he must pay to charity in excess of the amount other objectors pay to UAW "is effectively a reduction in his pay" and constitutes an adverse action.

True, the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union. Just as a union cannot unilaterally discharge or discipline an employee, it cannot by itself impose an employment obligation.[2] We need not attempt here to specify the precise contours of a prima facie case against a labor union, however. Nor do we have to determine the broader question of whether "discharge or discipline" should be understood to include any adverse employment action. The dissent contends that "[t]his case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline." Dissenting Op. at 15. But because we hold that the specific accommodation Reed challenges here does not rise to the level of an adverse employment action, we are not presented with the issue of whether a plaintiff can proceed on a showing of an

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[2] Reed's lawsuit is against UAW only, although the charity payment requirement to which Reed objects is imposed under the terms of a letter agreement signed by both UAW and AM General.

employment action that is "adverse" but is not a form of "discharge or discipline." Other than the accommodation itself, the reasonableness of which he challenges, Reed cannot point to any action by UAW that has adversely affected his employment. And whatever "discharge or discipline" or "adverse employment action" may mean in other contexts, a plaintiff does not carry his burden merely by showing that he has lost some amount of pay as a result of a proffered accommodation. *Tepper*, 505 F.3d at 514. Even under the standard the dissent proposes, the incremental adjustment to Reed's pay as a result of his charity-substitution payment is not actionable: It is not a *materially* adverse change in the terms or conditions of his employment. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996).

In *Tepper*, we rejected a similar attempt to establish an identity between the challenged accommodation and the alleged injury. There, the plaintiff was a Messianic Jew who observed each Saturday as his Sabbath. *Id.* at 511. Although the post office for which *Tepper* worked followed a rotating schedule that allowed employees to take turns having Saturdays off, initially the staffing levels were sufficiently high for management to accommodate *Tepper* by giving him every Saturday off. *Id.* at 511-12. After staffing levels were reduced, this arrangement became difficult to sustain, and Tepper's supervisor informed him that his accommodation was being withdrawn. *Id.* at 512. The supervisor advised Tepper to reserve vacation time for Saturday absences, to use annual leave and unpaid leave, and to exchange days off with other employees. *Id.* at 512-13. Tepper argued that this alternative arrangement constituted a form of discipline because it forced him to take unpaid leave, reducing his annual pay and his pension.

Id. at 513. We held, however, that "more than loss of pay is required to demonstrate discipline or discharge." *Id.* at 514.

Just as the plaintiff in *Tepper* could not point to any "discipline" other than the accommodation he claimed was unreasonable, Reed has suffered no discipline or adverse employment action other than the accommodation he claims is unreasonable—his required charity-substitution payment. The dissent contends that our reliance on *Tepper* is misplaced because in that case the employee was offered the option of taking unpaid leave so he could observe his Sabbath. Tepper's loss was different from Reed's, the dissent insists, because Tepper simply was not being paid for days he did not work. Dissenting Op. at 17. Even so, Tepper's accommodation required him to choose between violating his Sabbath by working his scheduled Saturdays, and observing his Sabbath but having limited opportunities to make up the lost hours and pay. Here, Reed's accommodation required him to choose between violating his religious beliefs by paying the agency fee—albeit the reduced agency fee—to the union, and honoring his religious beliefs by paying nothing to the union, but paying more out of pocket in order to satisfy his union security obligation. So in both *Tepper* and this case, the employee faced a choice of suffering either a monetary loss or a religious loss. Also of note, each plaintiff received a corresponding benefit unavailable to other employees: Tepper got every Saturday off, and Reed pays the union nothing while enjoying the benefits negotiated through collective bargaining.

The dissent contends that unless we are willing to treat a challenged accommodation as an adverse action, an employee can never prevail on a religious

accommodation claim unless he is first discharged or disciplined: "If the employee accepts the accommodation, then, under the lead opinion's view, the employee has acquiesced in the discrimination and abandoned any hope of a remedy." Dissenting Op. at 18. But an employee who believes that he is being treated less favorably because of his religion or some other protected ground has the right to bring a disparate treatment claim—a claim that Reed explicitly has disavowed.

IV. CONCLUSION

Because Reed has not shown any material adverse employment action, much less discharge or discipline, his religious accommodation claim fails. We therefore **AFFIRM** the district court's granting summary judgment in favor of UAW.

CONCURRING IN THE RESULT

RALPH B. GUY, JR., Circuit Judge, concurring. I concur in the result and write separately to clarify my reasons for affirming the decision granting summary judgment to the UAW with respect to Reed's Title VII religious accommodation claim. Apart from the questions raised concerning an appropriate *prima facie* test for such a claim by the lead and dissenting opinions in this case, I agree with the district court that the UAW's accommodation requiring substitute payment of the full amount of dues to a charity constituted a reasonable and nondiscriminatory accommodation of plaintiff's religious beliefs.

Title VII's definition of "religion" makes it an unlawful employment practice not to make reasonable accommodation for the religious practices of employees unless it would cause undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). An employee is entitled only to a reasonable accommodation, and, if reasonable, the defendant need not show that the employee's preferred accommodation would result in undue hardship. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986). The duty to accommodate an employee's religious beliefs extends to unions as well as employers. *Wilson v. NLRB*, 920 F.2d 1282, 1286 (6th Cir. 1990). Although several circuits have held that a union reasonably accommodates religious objectors by permitting the substitution of charitable contributions for union dues, no circuit has squarely addressed the reasonableness of requiring that the substituted charitable contributions be equal to the full *amount* of the dues.

See Wilson, 920 F.2d at 1286; *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 451 (7th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242 (9th Cir. 1981).

In addressing the question of reasonableness, the Court in *Ansonia* focused on whether the accommodation eliminated the conflict between the employment requirement and the employee's religious beliefs. 479 U.S. at 70. There, the specific accommodation—allowing the plaintiff to take unpaid leave to avoid working on Saturdays—eliminated the conflict between the employment requirement and religious practices and required him only to give up compensation for a day that he did not in fact work. *Id.* at 70-71. In this case, Reed concedes that allowing him to make substituted charitable contributions, even in the full amount of the dues, eliminated the conflict between the union security clause and his religious beliefs. Reed actually argues that the accommodation was not reasonable because it was discriminatory, relying on the caveat in *Ansonia* that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones." *Id.* at 71.

Reed insists that the relevant comparison is not with nonobjectors who pay the full amount of the dues, but with nonmember objectors (*Beck* objectors) who pay only that portion of dues expended on "core" representational activities (*i.e.*, 78.29% of the full dues). *See Communications Workers v. Beck*, 487 U.S. 735 (1988). In arguing that the difference is religious discrimination, Reed characterizes the comparison as being between "secular" and "religious" objectors. This is both misleading and inaccurate—as plaintiff's own situation demonstrates—since an employee may

elect nonmember *Beck* status because the union's political activities conflict with his religious beliefs. The difference is based not on the employee's reasons for objecting, but rather on the nature of the respective objection, and different objections call for different accommodations. *See, e.g., EEOC v. Univ. of Detroit*, 904 F.2d 331, 335 (6th Cir. 1990). Nor is Reed persuasive in arguing that only religious objectors are *compelled* to pay an amount equal to the full dues because any nonobjecting member can choose to leave the union and assert *Beck* objector status. That is to say nothing more than that an employee cannot be compelled *if* he is a *Beck* objector. Since the accommodation provided plaintiff in this case was reasonable, the district court did not err in granting summary judgment to the UAW with respect to Reed's religious accommodation claim.

DISSENT

McKEAGUE, Circuit Judge, dissenting. The lead opinion affirms based on Reed's failure to demonstrate either discharge or discipline as part of his prima facie case against his union—a union, it is worth noting, that does not have the power to discharge or to discipline. I do not think either Title VII or our past holdings requires such a showing. An adverse employment action should be all that is required to establish a prima facie case for a religious accommodation claim, and certainly no more than that should be required in a claim against a union. The UAW required Reed to pay more dues because of the religious nature of his objection to the union, and this increased payment was an adverse employment action. I would therefore hold that the increased payment was sufficient to establish the final element of Reed's prima facie case.

I also disagree with the concurring opinion's analysis of the reasonableness of the accommodation. Because I do not agree with either ground offered for affirming the district court's judgment, I respectfully dissent.

I.

Religious accommodation claims against employers arise under the same statutory provisions as other Title VII religions discrimination claims. Title VII makes it an unlawful employment practice to "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *TWA v. Hardison*, 432 U.S. 63, 74 (1977). Section 2000e-2(a)(1) also provides the basis for religious disparate treatment claims. *See Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir. 2007).

Despite the single statutory source for Title VII religious discrimination claims, our past decisions have incorrectly suggested a different level of harm is required to establish a prima facie disparate treatment claim based on religion than is required to establish a prima facie religious accommodation claim. A disparate treatment claim requires the employee show, among other things, "that he experienced an adverse employment action." *Tepper*, 505 F.3d at 515. An adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). A religious accommodation claim, meanwhile, appears to require a plaintiff to make a higher showing that "he was discharged or disciplined for failing to comply

with the conflicting employment requirement." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

This distinction between the amount of harm required under a disparate treatment theory and under a religious accommodation theory is not required by the statute. *See* 42 U.S.C. § 2000e-2(a)(1). It is also not required by our past holdings, though it is true that our religious accommodation precedents do use the "discharge or discipline" language. That is not surprising, because those decisions invoking the third element of the religious accommodation prima facie case almost invariably involve discharged employees. *See Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508, 515 (6th Cir. 2002) (discharged employee); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (discharged employee); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) (discharged employee); *McGuire v. Gen. Motors Corp.*, 956 F.2d 607, 609 (6th Cir. 1992); *Smith*, 827 F.2d at 1084 (discharged employee). These cases therefore did not need to address whether a claim could survive without showing that the plaintiff had been discharged.

Our two most recent religious accommodation cases illustrate only that the prima facie case cannot be satisfied without showing some adverse employment action. In *Tepper*, we found that the plaintiff had failed to establish the prima facie case because the only action taken against him was that his employer required Tepper to use unpaid leave for his observance of the Sabbath. 505 F.3d at 514. We noted that this not only failed to establish the prima facie case for religious accommodation, it failed to establish any adverse action at all. *See id.* at 516. Similarly, in *Goldmeier v. Allstate Ins. Co.*, the plaintiffs quit their

jobs before experiencing any adverse effect from their employer's failure to accommodate their religious beliefs. 337 F.3d 629, 633 (6th Cir. 2003). *Tepper* and *Goldmeier* therefore both involve plaintiffs that have not shown any adverse action, much less either discharge or discipline. They do not address whether a claim could succeed upon a showing of an adverse employment action other than discharge or discipline.

Other circuits have stated that an adverse employment action short of discharge or discipline is sufficient to establish the prima facie case for religious accommodation. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *see also Bowles v. New York City Transit Auth.*, 285 F. App'x 812, 813 (2d Cir. 2008); *Ali v. Alamo Rent-A-Car, Inc.*, 8 F. App'x 156, 158-59 (4th Cir. 2001). Indeed, I can find no decision in any circuit in which an appellate court found a plaintiff failed to establish a prima facie case where the plaintiff had demonstrated a materially adverse employment action.

Moreover, our precedents allude to the sufficiency of an adverse employment action in religious accommodation claims. In *Goldmeier*, we rejected the appellants' argument that they need not show any harm in order to satisfy the prima facie case: "neither this court, nor any of its sister circuits with substantively parallel religious discrimination jurisprudence, has ever endorsed the Goldmeiers' conclusion that no adverse employment action need be shown to sustain a prima facie case." 337 F.3d at 637. In *Tepper*, this court equated the "discharge or discipline" element of

the religious accommodation prima facie case with the "materially adverse employment action" requirement of a disparate treatment claim. 505 F.3d at 516.

This case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline. I would hold that a plaintiff should be able to succeed on such a showing. While discharge or discipline (assuming it is sufficiently severe) will always constitute a materially adverse employment action, there is no legal or logical reason why a plaintiff who suffers a materially adverse employment action must also show discharge or discipline.

II.

Further, even assuming that our precedents compel this court to require a showing of discharge or discipline in a religious accommodation suit against an employer, there is no reason to extend that requirement to claims brought against unions. As the lead opinion acknowledges, "the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union." There is a reason they do not fit nicely: the artificially high standard that we have previously suggested for a prima facie case against an employer simply can never be met in a claim against a union. As a union can neither discharge nor discipline an employee, applying the "discharge or discipline" element in claims against unions would foreclose all such claims. The lead opinion attempts to avoid this result by simply noting that there is no adverse employment action in this case. As I discuss below, I think it is clear that Reed did suffer an adverse employment

action. Even putting that to the side, however, I cannot see how we can avoid entirely the question of what level of harm a plaintiff must show in a claim against a union. We cannot hold that Reed failed to meet the prima facie case without any indication of what that prima facie case is.

Indeed, Title VII itself suggests there may be a difference between claims against employers and claims against unions. A religious accommodation claim against employers is rooted in 42 U.S.C. § 2000e-2(a)(1). *See Hardison*, 432 U.S. at 73. The Supreme Court has held that the language of that section—"'hire,' 'discharge' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Burlington N and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). The same language does not exist in Title VII's union provision. Instead, it is an unlawful practice for a union to "exclude or . . . expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion," *id.* § 2000e-2(c)(1), or to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." *Id.* § 2000e-2(c)(3). Notably, the phrase "otherwise discriminate against" is similar to that in Title VII's retaliation provision, which the Supreme Court has held is more expansive than the language in the provision giving rise to disparate treatment claims. *See Burlington*, 548 U.S. at 63-64.

Thus, even if this case does not provide an opportunity to clarify exactly what standard should apply in religious accommodation claims against unions (which I submit it does), the difference in statutory

language should at least give us pause before we extend the "discharge or discipline" requirement to claims against unions. Add this difference in statutory language to the practical reality that a "discharge or discipline" requirement would essentially bar religious accommodation claims against unions, and it is clear that we should not impose the "discharge or discipline" requirement in this context.

III.

As discussed above, I believe that a materially adverse employment action is the appropriate standard for all religious accommodation claims. Reed satisfied that standard. The UAW required Reed to make larger payments than secular objectors. This disparity constitutes an adverse employment action. Under Title VII, an employment action must amount to "a materially adverse change" in the terms or conditions of employment to be actionable. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *see also Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004). Notably, the Supreme Court stated that such an action will "in most cases inflict[ ] direct economic harm." *Ellerth*, 524 U.S. at 762. The economic effect does not have to be large in order to be an adverse employment action. *See White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 794, 802 (6th Cir. 2004) (en banc). A differential in pay establishes an adverse employment action. *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 758 (6th Cir. 2004).

The UAW required that Reed donate the full amount of union dues to charity rather than the lower amount political objectors must pay the union. If Reed had a secular objection to the union, the amount Reed would have to pay would decrease. This

is a direct economic effect that resulted in Reed receiving less net income. As such, the ongoing higher payment the union requires of religious objectors constitutes an adverse employment action.

IV.

The lead opinion seeks to minimize the significance of this economic burden by relying on *Tepper*. Yet *Tepper* presented a significantly different set of facts. In *Tepper*, the plaintiff sought days off to observe religious holidays. 505 F.3d at 512. His employer originally accommodated him, but later rescinded the accommodation. *Id.* His employer continued to permit the plaintiff to use unpaid leave for all of his holidays. *Id.* The plaintiff alleged that using unpaid leave decreased his pay. *Id.* We dismissed this argument, noting that "[t]he Supreme Court has stated that 'the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.' *Id.* at 514. We then concluded that "Tepper is simply not being paid for the time he does not work." *Id.* The same cannot be said for Reed.

Nor am I persuaded that the fact the adverse employment action in this case occurs as part of an accommodation should alter the analysis of the prima facie case.

There is no indication in our case law that the prima facie case is limited in this way. In *Tepper*, for example, we found that the prima facie case was not satisfied because the accommodation did not harm the plaintiff—not because the harm to the plaintiff was part of an accommodation. *See* 505 F.3d at 514.

Moreover, the lead opinion's arbitrary distinction between employer/union practices that "count" for the prima facie religious accommodation case and those that do not places religious employees in an unavoidable bind. If an employer or union offers the employee an accommodation that adversely affects the terms and conditions of his or her employment, the employee can do nothing but lose. If the employee accepts the accommodation, then, under the lead opinion's view, the employee has acquiesced in the discrimination and abandoned any hope of a remedy. Meanwhile, if an employee rejects the accommodation, the employee not only puts his or her employment in jeopardy, the employee also runs afoul of the Supreme Court's instruction that the employer, not the employee, chooses the accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-69 (1986). The lead opinion does not—and I think cannot—explain what an employee placed in this position should do in order to appropriately assert his or her rights under Title VII.

V.

I also find the concurring opinion unpersuasive in its analysis of the reasonableness of the accommodation at issue here. Unlike the concurring opinion, I do not think it is enough to say that Reed's objection is different from other accommodated objectors. Though this is undoubtedly true, it does not explain why the accommodation is reasonable.

While the union does not have to use the accommodation proffered by the employee, the union must offer a *reasonable* accommodation. *See E.E.O.C. v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). I would find the accommodation here unreasonable for two reasons: the union cannot require a payment of

this size from a nonmember, and the accommodation is discriminatory.

The Supreme Court has held that unions may exact from objecting nonmembers "only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988) (internal quotation marks and citation omitted). Based on this, the Sixth Circuit has observed that *Beck* "limit[ed] the amount of dues a union can charge a non-union member." *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367 (6th Cir. 1994). If a union cannot charge an objecting nonmember more than the *Beck* amount, it seems to me that there is no basis for offering an accommodation in excess of that amount. As Reed is an objecting nonmember, it seems to me that a reasonable accommodation should be based on the amount that the union can require from objecting nonmembers under *Beck*.[1]

In this regard, I find persuasive the district court opinion in *O'Brien v. City of Springfield*. Relying on a state statute and a state regulation that provided a rule similar to the rule established in *Beck*,[2] a Massa-

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[1] Although Reed did not articulate the argument in quite this fashion, he did raise a functionally identical argument in his briefs. Rather than phrasing the argument in terms of the amount the union can require him to pay, he argued that *Beck* gave objectors the right to choose not to pay the portion of union dues used for political purposes.

[2] The union notes that, unlike under *Beck*, the Massachusetts law does not permit unions to charge any nonmembers more than the agency service fee. *See* Mass. Gen. Laws ch. 150E, § 12; Mass. Regs. Code tit. 456, § 17.04. For the reasons given below

chusetts district court held that requiring a donation equal to full union dues was "a *per se* unreasonable accommodation." 319 F. Supp. 2d 90, 107 (D. Mass. 2003). It further explained that a union "is not entitled to charge whatever amount it wishes to someone making a charitable substitution." *Id.* at 106. The same reasoning should apply under *Beck*. The union should not be able to require objecting nonmembers to pay any more than *Beck* permits.[3] As Reed is an objecting nonmember, I would find that the union's attempt to force Reed to donate the full union dues amount rather than the amount paid by *Beck* objectors is unreasonable.

Further, the accommodation is discriminatory. The union admits that it prefers the elevated amount

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in footnote 3, I do not think this distinction alters the analysis of the reasonableness of the accommodation in this case.

[3] The union argues that, because nonmembers who do not object can be required to pay the full amount, the relevant benchmark should be the full dues amount. However, there is absolutely no dispute here that Reed has made his objections known to the union. Therefore, the relevant amount should be the Beck amount, not the full dues amount. So long as an objector makes his or her objection known, the union *cannot* charge the full dues amount under *Beck*. *See Beck*, 487 U.S. at 762-63; *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740, 774 (1961). What the union can charge other employees should therefore be irrelevant in determining the accommodation for Reed. Rather, the relevant standard should be based on the status of the employee in question. It would likewise be fruitless for an employer to argue that, when reviewing the termination of a for-cause employee, the court should consider that an employer can fire an at-will employee for any reason. Instead, what matters is the for-cause status of the employee in question. Similarly, the union should not point to the dues it can require other employees to pay; what matters is the amount it could otherwise require Reed to pay.

because "this arrangement does not create any financial incentive for employees to claim religious objection in order to reduce their financial obligations." Response Br. at 32. The value of the higher amount is precisely its deterrence of other members and nonmembers from asserting their religious objections. The union offers no other reason for requiring the elevated payments, and I cannot think of a nondiscriminatory reason for requiring religious objectors such as Reed to pay more in order to accommodate their objections. I would therefore find the amount the union requires Reed to pay is discriminatory. As such, the accommodation should also be deemed unreasonable under *Ansonia Board of Education v. Philbrook*. *See* 479 U.S. 60, 71 (1986) ("Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.").

VI.

There is no question that the only way Reed could avoid the conflict between his religious beliefs and the UAW's requirements was through a payment greater than that required of other objectors. I would find this sufficient to establish the third prong of the prima facie case for religious accommodation. I also would find the accommodation offered by the union unreasonable because the union lacks the authority to require such a large payment and the accommodation discriminates against religious objectors. Accordingly, I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 07, 2009]

No. 07-2505

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

Before: GUY, BATCHELDER, and McKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment in favor of defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX E

[523 F.Supp.2d 592]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed October 19, 2007]

Case No. 06-14233

JEFFREY J. REED,

Plaintiff,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendant.

OPINION & ORDER

Sean F. Cox, District Judge.

Plaintiff Jeffrey Reed ("Plaintiff" or "Reed") filed suit against Defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Defendant" or "the Union"). Plaintiff contends that the Union failed to provide a reasonable accommodation for his religious conflict with paying dues to the union, in violation of Title VII of the Civil Rights Act. Discovery has concluded and the parties agree that there are no genuine issues of material fact for trial. The matter is currently before the Court on the parties' cross-motions for Summary Judgment. The parties have fully briefed the issues and the Court heard oral argument on October 4, 2007. For the reasons below,

the court shall DENY Plaintiff's Motion for Summary Judgment and shall GRANT Defendant's Cross-Motion for Summary Judgment.

BACKGROUND

Reed is an hourly employee of AM General Corporation ("AM General"). Defendant is the exclusive bargaining representative for the assembly line employees. Defendant and AM General Corporation have a collective bargaining agreement ("CBA") that contains a union security provision that requires employees to join the Union or pay non-union member fees to Defendant as a condition of employment.

AM General and Defendant have also entered into an agreement that permits employees who have a sincere religious objection to financially supporting labor organizations to satisfy their financial obligations under the CBA's union security provision by contributing to charity an amount equal to the dues established by the Union Constitution. (Def.'s Statement of Material Facts, and Plaintiff's Response to same, at ¶ 3).

Dues for the Union are two hours straight time pay per month. (*Id.* at ¶ 4). Both members and non-members who do not object to the activities for which the Union expends their payments make union security payments to the Union in the amount of two hours straight time pay per month. (*Id.* at ¶ 5).

Reed joined the Union shortly after he was hired by AM General in May, 2002. (*Id.* at ¶ 1). For the first year of his Union membership, Reed paid his full dues to the Union.

In May, 2003, Reed requested to be treated as an objecting member and his request was granted. (*Id.* at ¶8).

As a result of *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Union's Constitution has a provision which permits nonmembers to object to the Union's expenditure of their dues for purposes primarily political in nature and to receive a rebate of the amount of their dues so expended ("*Beck* objectors"). (*Id.* at ¶¶ 6 & 7).

In October, 2004, Reed notified the Union that he was terminating his membership. After that time, the Union treated Reed as a *Beck* objector and his union security payments were reduced to 78.29% of what Union members and non-objecting nonmembers paid. (*Id.* at ¶¶ 14 & 15).[1]

In a letter to the Union dated February 10, 2005, Reed stated that he is a religious objector, and requested that he be permitted to direct his *Beck* union security payment to a charity, the Disabled Veterans of America, rather than to the Union. (*Id.* at ¶ 16). The Union then requested additional information from Reed. By letter of November 10, 2005, the Union advised Reed that his application to be treated as a religious objector was being granted retroactive to February 2005, when he first applied. (*Id.* at ¶ 28).

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[1] Each year, the Union prepares a report that provides notice of the percentage of Union expenditures that are expended for purposes related and not related to representation and collective bargaining. (*Id.* at ¶ 11). The two hours pay per month union security payments of *Beck* Objectors are then reduced by the non-representational expenditure percentage established in that report. (*Id.* at ¶12). For the 12 months beginning August 2004, *Beck* objectors paid 78.29% of two hours straight time pay as their union security obligation. (*Id.* at ¶13).

Reed requested that he be permitted to pay to the Disabled American Veterans an amount equal to the amount paid to the Union by non-member *Beck* objectors. (Compl. & Ans. at ¶ 13). That request was not granted. Rather, the Union provided Reed with a worksheet showing that his union security obligations as a religious objector under the Letter Agreement would be $439.44 for the period from February through November, 2005. (*Id.* at ¶ 29). That $439.44 represents the same amount that Reed would have paid to the Union as a non-objecting member. As a *Beck* objector he paid only $339.62 for that same period. (*Id.*).

The Union advised Reed that if he made a contribution in the amount of $439.44 to a charity he selected from those listed in the Letter Agreement, the Union would refund the $339.62 he had paid as a *Beck* objector. (*Id.* at ¶ 30). Reed made the payment to a charity he selected and the Union refunded him the amount he had previously paid as a *Beck* objector. (*Id.* at ¶ 31). Since November, 2005, Reed has made no payments to the Union, but rather, has been making payments to the charity he selected. (*Id.* at ¶ 33). Reed pays the same amount to the charity that he would have paid as a non-objecting member of the Union.

Reed then filed a complaint with the Equal Employment Opportunity Commission ("the EEOC"). After an investigation, the EEOC concluded that there is reasonable cause to believe that a violation of Title VII has occurred and issued a right to sue letter. The EEOC concluded that Defendant "refused to make a non-discriminatory reasonable accommodation to his sincerely held religious beliefs." (*See* Ex. G to Pl.'s Br.).

Reed filed this action against Defendant on September 26, 2006, alleging that Defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. In this action, Reed seeks a declaration that he has the right to an accommodation of his religious beliefs that allows him to pay only the fees paid by non-members who object for secular reasons (*i.e.*, the *Beck* objector amount) to a mutually agreed upon charity.

ANALYSIS

In their cross-motions for summary judgment, each party asserts that it is entitled to summary judgment under the undisputed facts of this case.

A. Plaintiff's Position:

Reed acknowledges that it is a reasonable accommodation to allow him to redirect his compulsory union fees to a mutually agreed charity. Reed's objection is with the *amount* he is required to pay to the charity. Reed seeks a declaration that he has the right to an accommodation of his religious beliefs that allows him to pay only the fees paid by *Beck* objectors (*i.e.*, ~ 78% versus 100% of regular dues).

He contends that by requiring him to pay the full amount of dues to a charity as a religious objector, the Union is requiring him to pay a "premium," "penalty" or "faith tax" as a religious objector that *Beck* objectors, who he claims are "secular," do not pay. At the hearing, however, Reed's counsel conceded that a *Beck* objector may elect that status for either secular or nonsecular reasons.

Reed relies on *O'Brien v. Springfield Education Ass'n*, 319 F.Supp.2d 90, 106-07 (D. Mass 2003), wherein the district court ruled that when a union

offered to accommodate a religious objector by requiring a charity-substitution payment equal to dues, the union had made a "per se unreasonable accommodation." Reed acknowledges that there are only two reported decisions on this issue: *O'Brien* and a decision contrary to *O'Brien, Madsen v. Associated Chino Teachers*, 317 F.Supp.2d 1175 (C.D. California 2004).

Reed contends that this Court must choose between two paths: 1) the "*Madsen* path," which Reed contends discourages as many employees as possible from taking advantage of the protections of their faith, or 2) the "*O'Brien* path," which Reed contends "encourages the protection of employees' faith, even if there is some (but not much) adverse impact on union treasuries." (Reed's Response Br. at 3).

B. Defendant's Position:

Defendant contends that Plaintiff's motion must be denied because the substituted charity option that Defendant provided to Reed is a reasonable accommodation of his religious objections under Title VII. Defendant asserts that under *Ansonia*, employers satisfy their accommodation obligation under Title VII by providing any reasonable accommodation and that they need not provide the specific accommodation requested by the employee. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). Defendant therefore contends that the issue is whether the accommodation it provided is reasonable.

Defendant notes that the Letter Agreement between AM General and Defendant that permits religious objectors to make payments to charity in an amount equal to dues is based on Section 19 of the National Labor Relations Act, which provides in pertinent part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations **shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund** exempt from taxation under section 501 (c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to sue the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

29 U.S.C. §169 (emphasis added).

Defendant asserts that the legislative history shows that in passing Section 19, Congress intended to provide an arrangement for religious objectors that served as a reasonable accommodation of their beliefs that satisfied the reasonable accommodation requirements of Title VII. (*See* Def.'s Response Br. at 9). Defendant notes that numerous courts have found a substituted charity accommodation to be reasonable.

Defendant notes that while the Sixth Circuit found Section 19 to be unconstitutional, because it restricted the substituted charity accommodation to employees who "adhere to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," the Sixth Circuit has never questioned the legality or reasonableness of the substituted charity accommodation as reasonable:

> Where a collective bargaining agreement includes a union security provision, courts have held that the duty to accommodate is satisfied by allowing an employee to donate an amount **equal to union** dues to a mutually acceptable charity . . . The substituted charity accommodation lets the union enjoy the benefits of a union security provision while permitting employees 'to practice in accordance with their religious convictions.'

Wilson v. National Labor Relations Board, 920 F.2d 1282, 1286 (6th Cir. 1990)(emphasis added).

Defendant also relies on *Madsen*, and the reasoning in that opinion, to support its motion for summary judgment.

Defendant further asserts that Reed's argument that he is being forced to pay "more than anyone else" is not supported in fact. Defendant notes that Reed pays the same amount that is paid by 1698 of 1699 of his co-workers. Defendant notes that of the 1700 bargaining unit employees at AM General, only Reed and one other employee elected Beck status, and Reed was the only employee to request treatment as a religious objector. (*See* Def.'s Reply Br.). Reed acknowledged the accuracy of these facts at the October 4, 2007 hearing.

C. The Court Concludes That Defendant Is Entitled to Summary Judgment Because Plaintiff Has Failed To Establish A Prima Facie Case Of Religious Discrimination.

Title VII provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's religion. 42 U.S.C. §2000e-2(a). The proscription against religious discrimination applies equally to a labor organization such as Defendant. *See* 42 U. S.C. §2000e-2(c).

A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate. Here, Reed relies exclusively on a failure to accommodate theory.

"The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Virts v. Consolidated Freightways Corp.*, 285 F.3d 508, 516 (6th Cir. 2002). The employee bears the burden of establishing a prima facie case, and sustains that burden by showing that: 1) he holds a sincere religious belief that conflicts with an employment requirement; 2) he has informed his employer of the conflict; and 3) **he was discharged or disciplined for failing to comply with the conflicting requirement.** *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994)(emphasis added); *see also Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 633 (6th Cir. 2003); *Tepper v. Potter*, __F.3d __ (6th Cir. Oct. 15, 2007).

With respect to that third element of a prima facie case, the Sixth Circuit has "consistently held that a

prima facie case of religious discrimination requires discharge or discipline for failure to comply with an employment requirement." *Goldmeier,* 337 F.3d at 634-35. In *Goldmeier*, the plaintiffs had not been discharged or disciplined but nevertheless attempted to pursue a religious discrimination claim and urged the court to abandon that requirement. The Sixth Circuit rejected such arguments. *Goldmeier*, 337 F.3d at 637 ("Nevertheless, for a number of reasons, we hold that discharge or discipline remains an element of a prima facie case of religious discrimination in employment.").

Here, Reed is still employed and has been paying an amount equivalent to regular dues to a designated charity. Unlike the plaintiff in *O'Brien*,[2] Reed's counsel acknowledged at the October 4, 2007 hearing that Reed has not been discharged or disciplined for any failure to pay dues.

Reed contends, however, that he is not required to show that he was discharged or disciplined before bringing his religious accommodation claim. At the October 4, 2007 hearing, Reed's counsel acknowledged that he was unaware of any Sixth Circuit authority that would allow him to establish a prima facie face of religious discrimination without establishing that such discipline or discharge had occurred. Counsel asserted that the closest Sixth Circuit case would be *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987). He also noted that the plaintiff in *Ansonia, supra*, had not been disciplined or discharged, yet was able to challenge the reasonableness of the accommodation offered.

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[2] The plaintiff in *O'Brien* was suspended without pay for failing to pay the agency service fee. *O'Brien*, 319 F.Supp.2d at 96.

The Court finds Reed's reliance on *Smith* and *Ansonia* to be misplaced. In *Smith*, the court stated that:

> The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination. Such a case is established when an employee shows that: (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; **and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement.**

Smith, 827 F.2d at 1085 (emphasis added). The court concluded that Smith, who was discharged because of his refusal to work on Sundays, had established a prima facie case. *Id.* at 1086. Only after determining that Smith had established a prima facie case did the analysis proceed to determining whether Smith's employer offered a reasonable accommodation. *Id.* at 1086 ("Having found that Smith established a prima facie case of discrimination, our analysis now shifts to the question of whether [Smith's employer] reasonably accommodated Smith's religious beliefs.")

Contrary to counsel's statements at oral argument, *Ansonia* does not support the proposition that the third element of the prima facie case is unnecessary. In *Ansonia*, the claim was not dismissed in the district court for want of a prima facie case, but rather, the action proceeded to a full trial on the merits. Due to the unique procedural posture of the case upon reaching the Supreme Court, the *Ansonia Court* held that "the issue whether [plaintiff] made out a prima facie case **was no longer relevant.**" *Ansonia*, 479 U.S. 60 at 61 (emphasis added). Thus, as the Sixth

Circuit noted in *Goldmeier*, the *Ansonia* Court "explicitly declin[ed] to rule on the existence of a prima facie case." *Goldmeier*, 337 F.3d at 637.[3]

The Court concludes that without being able to establish that he has been either discharged or disciplined for failing to comply with the employer's requirements concerning union dues payments, Reed cannot establish a prima facie case of religious discrimination under existing Sixth Circuit precedent. *See Cooper*, *supra*; *Goldmeier*, *supra*. If unable to establish a prima facie case of religious discrimination, Reed's claim fails and the Court need not consider whether Defendant provided a reasonable accommodation. *See Goldmeier*, 337 F.3d at 638.

D. In Addition, Assuming *Arguendo* That Plaintiff Could Establish A Prima Facie Case Of Religious Discrimination, Defendant's Accommodation Was Reasonable.

If Reed could establish a prima facie case of religious discrimination, the next inquiry would be to determine whether Defendant provided a reasonable accommodation for Reed's religious conflict.[4]

"It is well established that under Title VII, a 'reasonable accommodation' of an employee's religion is

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[3] The Court also finds Reed's reliance on *White v. Burlington Northern*, 364 F.3d 789 (6th Cir. 2004), a case wherein the plaintiff had been suspended without pay, misplaced. (*See* Pl.'s Suppl. Br.).

[4] In addition, if Defendant's efforts failed to eliminate the employee's religious conflict, then Defendant would have to establish that it is unable to reasonably accommodate the employee's beliefs without incurring "undue hardship." To require the Defendant to bear more than a *de minimis* cost in order to accommodate an employee's religious beliefs is an undue hardship. *Cooper*, *supra*

one that eliminates the conflict between the employment requirements and the employee's religious practices." 45A AM JUR.2D *Job Discrimination* §133. "The focus of the inquiry as to what type of accommodation is 'reasonable' is on whether the accommodation preserves the employee's terms, conditions, and privileges of employment, once the employer has eliminated the religious conflict with the employee's requirements." *Id.*

An employee is entitled only to a reasonable accommodation, not an accommodation of his choosing. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Id. at 68; Smith v. Pyro Mining Company*, 827 F.2d 1081, 1085 (6th Cir. 1987). "Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Ansonia*, 479 U.S. at 68-69.

"The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; **what may be a reasonable accommodation for one employee may not be reasonable for another.**" *Smith*, 827 F.2d at 1085 (emphasis added). Thus, each case involving such a determination will depend upon its own facts and circumstances and comes down to a determination of reasonableness under the unique circumstances of the individual employer-employee relationship. *Id.*

In this case, Reed was originally a member of the Union and paid his full dues to the Union. About a

year later, Reed became a *Beck* objector (*i.e.*, he objected only to paying that portion of his Union dues that would be used for the Union's political activity). As a *Beck* objector, Reed paid to the Union only the reduced *Beck* fees which are approximately 78% of the regular dues. Notably, of the 1700 bargaining unit employees at AM General, only Reed and one other employee elected *Beck* objector status.

Later, however, Reed advised Defendant that he objected to paying *any dues* to the Union on the basis of his religious beliefs. As an attempt to accommodate Reed's religious beliefs, Defendant advised Reed that he could make a substitute charity payment, equivalent to the amount of dues paid by 1698 of 1699 of Reed's co-workers.

The accommodation provided by Defendant eliminated the conflict between Defendant's requirement that Reed pay dues to the Union and Reed's personal religious beliefs, which he claims now prevent him from making any payments to the Union. Indeed, Reed's counsel acknowledged at the hearing that the conflict between Defendant's requirement and Reed's religious beliefs is eliminated by the substituted charity payment allowed by Defendant. Nevertheless, Reed claims that the accommodation is not reasonable because it is a "discriminatory accommodation" in that it requires Reed to pay an amount that is more than "any other objector who objects to paying dues for secular reasons."

In *Cooper*, the Sixth Circuit observed that an accommodation that results in the employee in question losing an employment benefit "enjoyed by all other employees who do not share the same religious conflict," is not reasonable because it is discriminatory. In that case, the plaintiff's religious beliefs did

not allow her to work on Saturdays. The employer's proposed accommodation was to allow the employee to use her vacation time to avoid working on Saturdays scheduled for production. The Court found that accommodation was not reasonable because it required the plaintiff to lose an employment benefit, her accrued vacation time, that was enjoyed by all other employees who did not share her religious conflict with working on Saturdays.

Unlike *Cooper*, this is not a situation where the accommodation provided by Defendant forces Reed to lose a benefit "enjoyed by all other employees" without a religious conflict. Indeed, the accommodation provided has Reed paying the very same amount as the overwhelming majority (1698 out of 1699) of his co-workers, who do not have either secular or nonsecular objections to the Union. On the record before this Court, there is only one employee out of the 1700 bargaining unit employees who is a *Beck* objector.[5] Thus, this is not a case where Reed is charged more than "everybody else." The accommodation provided eliminates Reed's religious conflict and does not result in the loss of any employment benefits to Reed.

Moreover, to the extent that Reed complains that the accommodation "discourages" him from asserting his religious objection to paying dues to the Union because he is now paying a total amount that is higher than the total amount he used to pay as a *Beck* objector, the Court finds that argument without merit. The Union has reasonably accommodated Reed in each of the various positions that he has asserted throughout his employment: 1) dues paying Union member, 2) *Beck* objector, and 3) religious objector. It

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[5] It is unknown whether that *Beck* objector elected that status based on secular or nonsecular reasons.

is not discriminatory to provide different accommodations to employees who assert different objections.

Group:	Accommodation:	Results:
Union Member having no objection to paying Union dues for representtation or political activity.	No accommodation was necessary, Reed paid his regular dues to the Union.	Union members pay their fair share of representation costs and political activity.
Beck Objector objecting to paying only that portion of union dues that is used for political activity, but not objecting to paying for cost of representation.	Reed was appropriately treated as Beck objector. Union broke down its costs and as *Beck* Objector Reed paid to the Union only that portion of Union dues that is used for representation (*i.e.*, he did not pay for political activity).	*Beck* Objectors pay for their fair share of representation costs but pay nothing to the Union towards the political activity they object to.
Religious Objector objecting to paying union dues for political activity and objecting to paying dues for the cost of representation.	As a religious objector Reed is permitted to pay nothing to Union and, instead, is permitted to donate an amount equal to his normal dues to a charity.	Religious Objectors pay nothing to the Union, although they receive the benefits of representation. Religious Objectors also get benefit of being able to support a charity of their choice (from those listed) and perhaps tax deduction for doing so.

In addition, to the extent that Reed complains that the accommodation discourages him from asserting his religious objection to paying dues to the Union because he is now paying a total amount that is higher than one of his fellow employees, who is a *Beck* objector, that is a disparate treatment argument and Reed has expressly disavowed such a theory. Moreover, even if Reed raised a disparate treatment theory, the Court agrees with the reasoning in *Madsen* that such a claim is without merit under the facts presented here.

CONCLUSION & ORDER

For the reasons set forth above, **IT IS ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Sean F. Cox
Sean F. Cox
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-14233

JEFFREY J. REED,

Plaintiff,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendant.

JUDGMENT

For the reasons set forth in an Opinion & Order issued this date,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE.**

/s/ Sean F. Cox
Sean F. Cox
United States District Judge

Dated: October 19, 2007

APPENDIX G

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Indianapolis District Office

101 West Ohio Street, Suite 1900
Indianapolis, IN 46204-4203
(317) 226-7212
TTY (317) 226-5162
Fax (317) 226-7953 & 5571

June 08, 2006

Jeff J. Reed Charge Number 24M-2005-00194
9708 Beechnut Street
Bridgman, Michigan 49106 Charging Party

UAW International
8000 E. Jefferson Avenue
Detroit, Michigan 48214 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination as to the merits of the subject charge under Title VII of the Civil Rights Act of 1964, as amended (Title VII).

All requirements for coverage have been met. Charging Party alleges that he was discriminated against because of his religion, Catholic, in violation of the Title VII, in that Respondent has refused to make a non-discriminatory reasonable accommodation to his sincerely held religious beliefs.

Based upon the investigation, the Commission concludes that there is reasonable cause to believe that a violation of Title VII has occurred.

This determination does not conclude the processing of this charge. The Commission will begin conciliation efforts to resolve all matters where there is reason to believe that a violation has occurred.

Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. When the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason is unable to secure a settlement acceptable to the Office Director, the Director shall so inform the parties in writing and advised[sic] them of the court enforcement alternative available to the Charging Party and the Commission.

On Behalf of the Commission:

/s/ Joy L. Pentz for:
Danny G. Harter
District Director

cc: Barry A. Macey
MACEY SWANSON & ALLMAN
445 N. Pennsylvania St.
Suite 401
Indianapolis, IN 46204

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed September 21, 2009]

No. 07-2505

JEFFREY J. REED,
Plaintiff-Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, Chief Judge; GUY and McKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge McKeague would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk